

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7407

United States Court of Appeals

FOR THE SECOND CIRCUIT

GREEFF FABRICS, INC.,

Plaintiff-Appellant,

—v.—

MALDEN MILLS INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

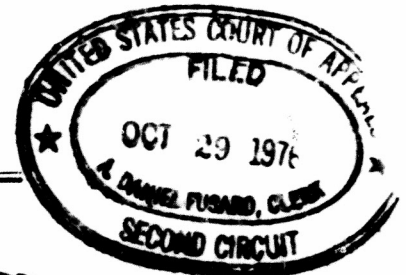
JOINT APPENDIX

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GREEFF FABRICS, INC. Vs. MALDEN MILLS INDUSTRIES, INC.

Civ. 1188

(Pg #2)

JUDGE CANNELLA

DATE	NR.	PROCEEDINGS
3-11-76	1	Filed complt. and issued summons.
3-16-76	(2)	Filed plttf's affdvt. and Order to Show Cause for a preliminary injunction. Ret. 03-15-76 at 2:30 a.m. CANNELLA, J. and marshal's return- served: Malden Mills Industries, Inc. by Eli Horowitz on 03-12-76
3-16-76	(3)	Filed memorandum of law in support of plttf's motion for preliminary injunction.
3-16-76	(4)	Filed stip & order adjourning plttf's motion for a preliminary injunction to 03-19-76 as indicated. So ordered- CANNELLA, J.
3-16-76	(5)	Filed summons and return- served: Malden Mills Industries, Inc. by Eli Horowitz on 3-12-76
03-23-76	(6)	Filed deft's supplemental memorandum of law in opposition to motion for preliminary injunction.
03-19-76	---	BEFORE CANNELLA, J. Non-Jury trial begun on a prelim. injunction and concluded. Judge's decision reserved.
3-26-76	(7)	Filed plttf's affdvt. of Robert S. Stoll in support of motion for preliminary injunction.
3-31-76	(8)	Filed Plttf's Amended Complaint
4-07-76	(9)	Filed Deft. ANSWER to Amended complaint
04-13-76	(10)	Filed plttf's memorandum of law on adequacy of copyright notice.
04-13-76	(11)	Filed deft's memorandum of law in opposition to motion for preliminary injunction.
04-13-76	(12)	Filed Memorandum-Decision OPINION # 44221-- for the reasons stated, plttf's motion for a preliminary injunction must be denied. So ordered- CANNELLA, J. (m/n)
4-15-76	(13)	Filed defts notice to take deposition of plttf on May 6, 1976
05-05-76	(14)	Filed plttf's notice of motion for an order for leave to reargue, etc. Ret. 05-05-76
05-05-76	(15)	Filed plttf's memorandum in support of motion to renew motion for preliminary injunction.
05-05-76	(16)	Filed plttf's affdvt. of Richard C. Johann in support of motion for a rehearing or renewal of its motion for a preliminary injunction.
05-06-76	(17)	Filed transcript of record of proceedings dated 3-19-76
05-07-76	(18)	Filed plttf's affdvt. of Carl Golden confirming the statements made in the affdvt. of Jeffrey Haber, dated 4-23-76, concerning the two incidents in Hickory, N.C. in February of this year.
05-07-76	(19)	Filed deft's supplemental affdvt. of George E. Goldberg in opposition to motion for reargument and in support of motion to strike affdvt. filed without leave of court and to strike late-served memorandum of law.
05-07-76	(20)	Filed deft's affdvt. of George E. Goldberg in opposition to motion for reargument
05-07-76	(21)	Filed stip & order adjourning plttf's motion for leave to reargue or in the alternative to renew its motion for a preliminary injunction, to 05-07-76, and the deposition of plttf, scheduled for 5-6-76, is adjourned to 5-14-76. So ordered- CANNELLA, J.
05-10-76	---	Filed memo endorsed on document # 14-- plttf's motion to reargue and renewed motion for a preliminary injunction are denied. The parties are directed to prepare for trial as expeditiously as possible. So ordered- CANNELLA, J. (m/n)
05-13-76	(22)	Filed plttf's notice of appeal to USCA from the order dated 4-13-76 denying plttf's motion for a preliminary injunction and from the order dated and entered 5-10-76 denying plttf's motion to reargue or to renew, the motion for preliminary injunction. Copy to: Krcindler, Rolkin & Goldberg. Ent. 5-14-76

(CONT'D - Pg #3)

76 CIV. 1188--GRIEFF FABRICS, INC.- vs- MALDEN MILLS INDUSTRIES, INC.

76 CIV. 11

(PAGE # 3)

(CANNELLA, J.)

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
05-18-76	Filed memo endorsed on document # 19-- the within motion to strike certain affidvs. on plttf's renewed motion is hereby denied nunc pro tunc. CANNELLA, J. (m/n)
05-19-76	Filed Plttf's Memorandum in opposition to deft's motion to disqualify plttf's attys.
05-18-76	PRE-TRIAL CONFERENCE HELD BY CANNELLA, J.
05-24-76	(24) Filed deft's notice of motion for an order to reargue motion to strike affidvs. filed without leave of court. Ret 05-27-76
05-24-76	(25) Filed deft's memorandum in support of motion to reargue motion to strike affidvs. filed without leave of court.
06-08-76	(26) Filed plttf's notice of motion for an order for partial summary judgment pursuant to Rules 54 and 56 FRCP... Ret. 6-11-76
06-08-76	(27) Filed plttf's statement pursuant to General Rule 9(g)
06-10-76	(28) Filed Plttf's Memorandum in opposition to Deft's Motion to reargue motion to strike affidavits.
06-11-76	(29) Filed plttf's reply memorandum on motion for partial summary judgment.
06-11-76	(30) Filed memorandum of law in support of deft's motion to remove plttf's attys.
6-1-76	(31) Filed deft's affidv. of George E. Goldberg in response to plttf's reply memorandum and in opposition to motion for partial summary judgment.
06-11-76	(32) Filed deft's memorandum of law in opposition to motion for partial summary judgment on second cause of action.
07-09-76	(33) Filed true copy of USCA stip & order that the appeal is withdrawn, without costs, without attys' fees and without prejudice, etc.
07-13-76	BEFORE CANNELLA, J. NON-JURY TRIAL HEARD.
07-14-76	trial cont'd and concluded. Judge's decision-reserved. submit briefs.
7-14-76	(34) Filed plttf's interregs.
7-14-76	(35) Filed plttf's notice of taking deft's deposition on 6-23-76 and notice to produce.
07-14-76	(36) Filed plttf's notice of taking deposition of Myron Fogal on 6-29-76
7-14-76	(37) Filed deposition of Norman M. Popper taken on 6-18-76
7-14-76	(38) Filed deposition of Milton J. Glasser taken on 6-23-76
7-14-76	(39) Filed deposition of Sanford L. Levine taken on 6-23-76
07-15-76	(40) Filed transcript of record of proceedings dated 5-20-76.
07-16-76	(41) Filed Deft's Post-Trial Memorandum.
07-16-76	(42) Filed stip & order that all production, sales and profit or loss figures produced by the parties shall be held in confidence and used solely for the purposes of the above action. So ordered- CANNELLA, J.
08-11-76	(43) (filed in court on 7-13-76) Filed Amended Complaint
08-11-76	(44) (filed in court on 7-13-76) Filed Plttf's Post Trial Brief.
08-11-76	(45) Filed Memorandum Decision (Opinion No. 44954) for the reasons stated Plttf's complaint in the instant action is dismissed with prejudice. The foregoing constitute the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Civil Procedure 52(a) So. Ordered. CANNELLA, J. m-n
08-11-76	(46) Filed Stip and Order that all production, sales & profit or loss figures produced by the parties shall be held in confidence & used solely for the purposes of above action. So ordered. CANNELLA, J.
08-12-76	(47) Filed Judgment that deft Malden Mills Ind. Inc. have judgment against plttf Greeff Fabrics Inc., dismissing the action with prejudice. CLERK.
08-17-75	(48) Filed plttf's notice of appeal to USCA from the judgment dated and entered on 8-12-76 and the decision dated and entered 8-11-76 embodying findings of fact and conclusions of law. Copy to: Kreindler, Balkin & Goldberg. Pnt. 8-19-76 m-n

(CONT'D -PAGE # 4- OVER)

[illegible]

(PAGE # 4)

PROCEEDINGS		Date Order or Judgment Noted
5	Filed def't's affidvts. and notice of motion for an order for costs and atty's fees... Ret. 8-24-76.	
	Filed memorandum of alw in support of def't's motion for costs and atty's fees.	
76	Filed pl'tff's response to def't's motion for costs and atty's fees.	
6	Filed supplemental affidvt. of George E. Goldberg in support of motion for costs and atty's fees.	
2	Filed transcript of ... 6-11-76	
	Filed transcript of ... 7-14, 15-76	

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GREEFF FABRICS, INC., :
 :
Plaintiff, :
 :
-against- : 76 Civ. 1188 (J.M.C.)
 :
MALDEN MILLS INDUSTRIES, INC., :
 :
Defendant. :
-----X

A M E N D E D C O M P L A I N T

First Cause of Action

Admits

1. This action is for copyright infringement. It is brought pursuant to the Copyright Law of the United States, Title 17 of the United States Code, Sections 101, 112 and 116. Jurisdiction is based on Title 28 of the United States Code, Sections 1333 and 1400.

Denies

2. On information and belief, the acts of copyright infringement of which complaint is herein made have been and continue to be committed within the Southern District of New York and in interstate commerce throughout the United States.

Denies
knowledge
or infor-
mation

3. Plaintiff is a New York corporation having its principal office and place of business at 150 Midland Avenue, Fort Chester, County of Westchester, State and Southern District of New York.

Admits

4. On information and belief, defendant is a New York corporation having a place of business at 1 Pennsylvania Plaza in the City, County, State and Southern District of New York. Further on information and belief, the accused fabric is displayed and sold at said address.

Denies
knowledge
or infor-
mation

5. Prior to August 15, 1974, plaintiff, who was then and ever since has been a citizen of the United States, created an original work of art in the form of a fabric design entitled "58710-13 CONTEMPLATION".

Denies
knowledge
or infor-
mation

6. This work of art contains a large amount of material wholly original with plaintiff, and constitutes copyrightable subject matter under the Copyright Law of the United States.

Denies
knowledge
or infor-
mation

7. Between August 15, 1974 and September 13, 1974, plaintiff complied in all respects with the Copyright Law of the United States and all other laws governing copyright, including publishing with copyright notice and depositing true copies of said work of art with the Register of Copyrights, and secured the exclusive rights and privileges in and to the copyright of said work of art and received from the Register of Copyrights a certificate of registration, dated and identified as follows:

September 13, 1974 - Copyright Registration No. Gp 93648.

Denies

8. Since August 15, 1974, said work of art has been published by plaintiff, and all copies of it made by plaintiff or under plaintiff's authority or license have been published in strict conformity with the Copyright Law of the United States.

Denies

9. Since August 15, 1974, plaintiff has been and still is the sole proprietor of all right, title and interest in and to the copyright in said work of art, and since September 13, 1974 plaintiff has been and still is the sole proprietor of all right, title and interest in and to said Copyright Registration No. Gp 93648.

Denies

10. On information and belief, shortly prior to the institution of this action, but on a date presently not known to plaintiff, defendant procured a specimen of plaintiff's copyrighted CONTEMPLATION fabric design and, with full knowledge of plaintiff's copyright therein, knowingly, wantonly and intentionally commenced to infringe and has continued to the present day to infringe plaintiff's said copyright and copyright registration by making or having made, publishing and placing upon the market, and selling in interstate commerce in large quantities, substantial copies of plaintiff's said copyrighted work of art, said copies being in the form of fabric embodying a fabric design which is a substantial copy of plaintiff's copyrighted fabric design and bearing Style No. I 1197.

Denies

11. On information and belief, defendant has printed, or has had printed for it, a large number or repeats of the accused fabric design, and has, in addition, published or caused to be published and has widely distributed or caused to be widely distributed catalogues, catalogue sheets, prints, advertisements, photographs and other publications, containing in large quantity reproductions of said accused fabric design, said repeats and said reproductions of said accused fabric design each constituting a great number of infringing copies of plaintiff's registered copyright and copyrighted CONTEMPLATION fabric design.

Denies
knowledge
or infor-
mation

12. Annexed hereto as Exhibit 1 is a copy of plaintiff's Copyright Registration No. Gp 93648. Annexed hereto as Exhibit 2 is a copy of plaintiff's copyrighted CONTEMPLATION fabric design. Annexed hereto as Exhibit 3 is a copy of defendant's infringing fabric design, Style No. I 1197.

Denies ex-
cept admits
defendant
sold fabric
embodying
design
shown in
Exhibit 2
to amended
Complaint
(plain-
tiff's
design).

13. Defendant had notice of plaintiff's said copyright, prior to copying of plaintiff's copyrighted fabric design, but defendant nevertheless proceeded and has continued to the present day to infringe same to plaintiff's great and irreparable damage and injury.

Second Cause of Action

Denies

14. This cause of action is brought pursuant to the Lanham Trademark Act of 1946, Section 43(a), Title 15 of the United States Code, Section 1125(a). Jurisdiction is based on the Lanham Trademark Act of 1946, Section 39, Title 15 of the United States Code, Section 1121.

Denies

15. On information and belief, the acts of which complaint is herein made have been and continue to be committed within the Southern District of New York and in interstate commerce throughout the United States.

Denies

16. Plaintiff restates and realleges the allegations of paragraphs 3 through 10, inclusive, of the First Cause of Action as if here set forth in full.

Denies except admits that strike-offs are used as samples for solicitation of orders

17. On information and belief, defendant has affixed or applied, or has caused to be affixed or applied, to its accused goods, the following description or representation, to wit: "Malden © Strike-off", and has caused such goods to enter into commerce in competition, and in unfair competition, with plaintiff's copyrighted goods embodying the same pattern and bearing plaintiff's copyright notice.

Denies 18. Such description or representation constitutes a claim of originality, exclusivity and copyrightability, all of which are false and conflict with plaintiff's claim of originality, exclusivity and copyrightability for the same pattern.

Denies except denies knowledge or information as to plaintiff's belief 19. Defendant, having appropriated plaintiff's work of art, by its false description or representation seeks to appropriate unto itself copyright therein, and plaintiff believes and avers that it is or is likely to be damaged by the use of such false description or representation.

Denies 20. Such false description or representation constitutes a palming-off by defendant of plaintiff's original, exclusive and copyrighted work of art as and for the original, exclusive and copyrighted work of art of the defendant, in competition with plaintiff, all to plaintiff's great and irreparable damage and injury.

WHEREFORE, plaintiff respectfully demands judgment as follows:

As to the First Cause of Action:

a. That defendant, its officers, agents, employees, suppliers and distributors, and all others acting in concert with them, be enjoined, during the pendency of this action and permanently thereafter, from infringing plaintiff's CONTEMPLATION copyright and Copyright Registration No. Gp 93648 and from distributing infringing copies of plaintiff's said copyrighted work of art, including fabric, catalogues, catalogue sheets, prints, advertisements, photographs and other publications containing infringing copies of plaintiff's said copyrighted work of art;

b. That defendant be required to pay to plaintiff such damages as plaintiff has sustained and is sustaining in consequence of defendant's infringement of said copyright and copyright registration, and to account for all gains, profits and advantages by defendant from said infringement, together with all losses sustained by plaintiff, or such damages as the Court may find, within the provisions of the Copyright Law, but not less than \$1.00 for every infringing copy of said copyrighted work, including \$1.00 per copy for every infringing repeat, catalogue, catalogue sheet, print, advertisement, photograph and publication made, sold, distributed, authorized by or found in the possession or control of the defendant or its officers, agents, employees, suppliers or distributors, or those acting in concert with them;

c. That defendant be required to deliver up to the Court to be impounded during the pendency of this action and destroyed thereafter, all infringing copies of plaintiff's said copyrighted work of art, including fabric, catalogues, catalogue sheets, prints, advertisements, photographs and publications which may be in the possession or control of the defendant or its officers, agents, employees, suppliers or distributors, or those acting in concert with them, as well as all plates, rollers or other means for making such infringing copies;

d. That defendant be required to pay the full costs and disbursements of this action, including plaintiff's attorneys' fees; and

e. Such other and further relief as may be just and proper.

As to the Second Cause of Action:

a. That defendant, its officers, agents, employees, suppliers and distributors, and all others acting in concert with them, be enjoined during the pendency of this suit and permanently thereafter, from making the false descriptions or representations herein complained of, and from palming-off its copy of plaintiff's copyrighted CONTEMPLATION fabric design as defendant's own original, exclusive and copyrighted work of art.

b. That defendant be required to pay to plaintiff such damages as plaintiff has sustained and is sustaining in consequence of defendant's acts of which complaint are made, to account for all gains, profits and advantages derived by defendant from said acts, or such damages as to the Court may be just, and such punitive and exemplary damages as the Court may award;

c. That defendant be required to pay the full costs and disbursements of this action, including plaintiff's attorneys' fees; and

d. Such other and further relief as may be just and proper.

STOLL and STOLL
Attorneys for Plaintiff
Empire State Building
New York, New York 10001
212 736-0290

By: _____
A Member of the Firm

12a
ANSWER TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
GREEFF FABRICS, INC., :
 :
Plaintiff, : 76 Civ. 1188 (JMC)
 :
-against- : ANSWER TO AMENDED COMPLAINT
 :
MALDEN MILLS INDUSTRIES, INC., :
 :
Defendant. :
-----x

Defendant, Malden Mills Industries, Inc., by its
attorneys, KREINDLER, RELKIN & GOLDBERG, for its answer to the
amended complaint herein, respectfully alleges:

AS TO PLAINTIFF'S FIRST CAUSE OF ACTION

1. Admits the allegations contained in paragraph
1 of the amended complaint, except avers that 17 U.S.C. §10,
regarding notice of copyright, is also pertinent.
2. Admits the allegations contained in paragraph 4
of the amended complaint.
3. Denies information sufficient to form a belief as
to the truth of each and every allegation contained in paragraphs
3, 5, 6, 7 and 12 of the amended complaint.
4. Denies each and every allegation contained in
paragraphs 2, 8, 9, 10, 11 and 13 of the amended complaint
except admits that defendant has produced, marketed and sold
fabric embodying the design annexed to the amended complaint
as Exhibit 2 or a facsimile thereof.

AS TO PLAINTIFF'S SECOND CAUSE OF ACTION

5. Denies each and every allegation contained in paragraphs 14, 18 and 20 of the amended complaint.

6. Denies each and every allegation contained in paragraphs 15, 16 and 17 of the amended complaint except admits that defendant has affixed to certain small swatches of its fabric embodying the subject design a notice to its customers that such swatches are not regular production goods but only "strike-offs" - that is, sample goods to which the production goods to be shipped to customers might not exactly conform. To the extent that any reference to copyright is made on such strike-offs, such reference is altogether inadvertent and unintended, and strike-offs are never sold or used in any manner except as samples for solicitation of orders. All production goods made by defendant embodying the subject design are sold without any notice of copyright whatsoever. Defendant has never claimed and does not claim copyright in the subject design.

7. Denies each and every allegation contained in paragraph 19 of the amended complaint except denies information sufficient to form a belief as to the truth of the allegations contained therein regarding the state of plaintiff's belief.

FIRST AFFIRMATIVE DEFENSE

8. Copies of the subject design have been published under plaintiff's authority without proper notice of copyright as required by 17 U.S.C. §10. Plaintiff has thereby forfeited its copyright in the subject design.

SECOND AFFIRMATIVE DEFENSE

9. If defendant infringed plaintiff's alleged copyright in the subject design, such infringement was innocent in that defendant had no knowledge until the commencement of this action that plaintiff (or anyone else) claimed copyright in the subject design.

THIRD AFFIRMATIVE DEFENSE

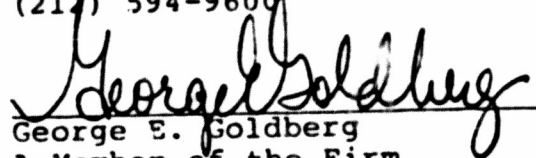
10. Plaintiff's second cause of action fails to state a claim upon which relief can be granted.

WHEREFORE, defendant respectfully demands judgment dismissing the amended complaint herein and directing plaintiff to pay the full costs and disbursements of this action, including defendant's reasonable attorneys' fees, and granting defendant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 6, 1976

KREINDLER, RELKIN & GOLDBERG
Attorneys for Defendant
500 Fifth Avenue
New York, New York 10036
(212) 594-9600

By:


George E. Goldberg
A Member of the Firm

STIPULATION OF AGREED
DATED JUNE 18, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

GREEFF FABRICS, INC.,	:	
	:	
Plaintiff,	:	76 Civ. 1188 (JMC)
-against-	:	STIPULATION OF AGREED
	:	<u>FACTS</u>
MALDEN MILLS INDUSTRIES, INC.,	:	
	:	
Defendant.	:	

-----x

IT IS HEREBY AGREED by and between the attorneys for the respective parties that, for purposes only of plaintiff's motion for a preliminary injunction, the following facts are agreed to be true:

1. Plaintiff is the author of an original work of art in the form of a fabric design entitled "58710-13 CONTEMPLATION". Said fabric design repeats every 25-1/2 inches.

2. This work of art contains a large amount of material wholly original with plaintiff, and constitutes copyrightable subject matter under the Copyright Law of the United States.

3. Between August 15, 1974 and September 13, 1974, plaintiff complied in all respects with the Copyright Law of the United States and all other laws governing copyright, including publishing with copyright notice and depositing true copies of said work of art (to wit, two pieces of fabric embodying said design, each piece being more than one yard and less than three yards in length and selvage to selvage in width) with the Register of Copyrights, and secured the exclusive rights and privileges in and to the copyright of said work of art and

received from the Register of Copyrights a certificate of registration, dated and identified as follows:

September 13, 1974 - Copyright Registration No.
Gp 93648.

4. Since August 15, 1974 said work of art has been published by plaintiff, and all copies of it made by plaintiff have been published in strict conformity with the Copyright Law of the United States.

5. Thereafter, and prior to the institution of this action, plaintiff discovered that one Belle Fabrics, Inc. of Haledon, New Jersey (hereinafter referred to as "Belle") was producing and selling textile fabric embodying the subject design. Plaintiff instituted an action against Belle in the United States District Court for the District of New Jersey for copyright infringement. That action terminated in a consent judgment and an agreement dated October 20, 1975 between plaintiff and Belle (copy attached hereto as Exhibit A) whereby plaintiff, at Belle's request, granted Belle a limited license to continue selling fabric embodying the subject design for a phase-out period to be completed by May 1, 1976, and Belle agreed to place on all said fabric or reproductions thereof sold or displayed in any form a notice bearing the following legend:

"Fabric design licensed and copyright
© by Greeff Fabrics, Inc."

Plaintiff has agreed that said notice may, in the alternative, read as follows:

"Fabric Design Copyright
© by Greeff Fabrics, Inc.
Not a Greeff product."


6. Plaintiff's design which is the subject of this action, and the design embodied in the Belle fabric, are for all practical purposes identical.

7. Defendant has copied the design embodied in the Belle fabric and defendant has produced and sold fabric embodying the said design and continues to produce and sell fabric embodying said design.

Dated: New York, New York
March 18, 1976

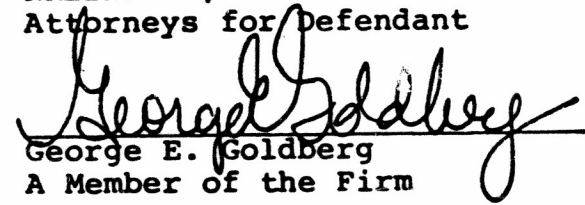
STOLL AND STOLL
Attorneys for Plaintiff

By:


Robert S. Stoll
A Member of the Firm

KREINDLER, RELKIN & GOLDBERG
Attorneys for Defendant

By:


George E. Goldberg
A Member of the Firm

SO ORDERED:

U.S.D.J.

PLAINTIFF'S INTERROGATORIES and
 DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- x

GREEFF FABRICS, INC.,	:	
Plaintiff,	:	76 Civ. 1188 (JMC)
-against-	:	ANSWERS TO PLAINTIFF'S INTERROGATORIES SERVED
MALDEN MILLS INDUSTRIES, INC.,	:	<u>JUNE 24, 1976</u>
Defendant.	:	

----- x

Defendant, Malden Mills Industries, Inc., answering
 plaintiff's interrogatories served June 24, 1976, respectfully
 alleges:

INTERROGATORY NO. 1: State specifically and in detail
 the factual basis of the underlined part of the following state-
 ment made to the Court by counsel for defendant at the hearing
 of March 19, 1976 (Transcript of hearing, pages 6, 7):

"What defendant says is defendant got a
 piece of fabric, got several pieces of fabric
 embodying this design or a design similar to
 this design.

"We have since learned that those pieces
of fabric were made under license by plaintiff
 therefore, under the authority of the plaintiff
 in the language of section 10 of the copyright
 statute. Those pieces had no copyright notice
 whatsoever anywhere on them.

* * *

"Therefore, there is no question in this
 case about what was copied. We will present to
 the court large pieces of the fabric that was
 made under license by plaintiff and the testimony
 of the witness from the defendant that that is the
 fabric they copied. There is no question that it
 was copied." (Our emphasis)

ANSWER NO. 1: In saying that these pieces of fabric were "made under license by plaintiff", Mr. Goldberg of course meant to refer to the operative act of publication within the meaning of the Copyright Act. Indeed, Malden knows that Belle does not "make" anything but acts only in the capacity of an importer or textile converter who purchases fabric for resale.

As of the date of the hearing, March 19, 1976, the only date Malden was aware of was the date which appeared on the license agreement between Greeff and Belle, to wit, October 20, 1975. At that time Malden had only a general idea of when it first obtained a sample of the Belle fabric. Malden did know that it first showed its version of the Belle fabric some time in January 1976 and therefore assumed that it obtained its first sample of the Belle fabric well after October 20, 1975. However, in subsequently checking its records Malden found a purchase order to its screenmaker dated October 21, 1975. Since Milton J. Glasser, the head of Malden's Print Division, remembered that he sent the Belle fabric to the screenmaker as soon as he received it, Malden now believes that it first obtained the Belle fabric on or about October 20, 1975, that the person who obtained it on behalf of Malden mailed it to Malden's mill in Massachusetts on or about October 20, 1975, and that Malden delivered the fabric to its screenmaker for testing on October 21, 1975. While it is therefore possible that the first sample of Belle fabric which Malden obtained was published by Belle before its license agreement with Greeff, it is also possible that Belle published such fabric after the license agreement was executed.

In any event, Malden obtained the other two pieces of Belle fabric, the ten-yard piece and the five-yard piece, well after the license agreement was entered into. Malden

recalls obtaining the ten-yard piece some time in November 1975, probably around November 10, 1975, approximately three weeks after the license agreement between Greeff and Belle was executed. Malden recalls obtaining the five-yard piece after this litigation was instituted, that is, several months after the license agreement was entered into. That five-yard piece had a piece ticket stapled to it identifying the fabric as made by Belle. The piece ticket also had on its reverse side a copyright notice in the name of Greeff, proving beyond any doubt that the five-yard piece was made under plaintiff's authority.

Accordingly, Malden believes that the first sample of Belle fabric which Malden obtained may have been published by Belle under plaintiff's authority, and believes that the second and third pieces of Belle fabric which Malden obtained were indeed published by Belle under plaintiff's authority.

INTERROGATORY NO. 2: If there are any documents which support or confirm the answer to Interrogatory 1, please annex copies of such documents to said answer. If the documents have previously been produced for plaintiff's inspection, please identify them without annexing copies to the answer.

ANSWER NO. 2: See Malden's purchase order to its screenmaker dated October 21, 1975, and the screenmaker's invoice to Malden dated November 26, 1975, copies attached hereto as Exhibits A and B, respectively. Malden is unaware at this time of any other document which might relate to Answer No. 1 above, but Malden is continuing to search for any such documents and if they are found will supply them to plaintiff's attorneys.

INTERROGATORY NO. 3: State whether counsel for defendant (George E. Goldberg, Esq.) has personal knowledge of any of the facts set forth in the answer to Interrogatory 1.

ANSWER NO. 3: No. Mr. Goldberg has no personal knowledge of any of the facts stated to Answer No. 1 above. Indeed, Mr. Goldberg did not see any of the fabric referred to above until after this action was instituted.

INTERROGATORY NO. 4: State whether defendant has any witnesses, other than Sanford Levine and Milton Glasser, with knowledge of any of the facts set forth in the answer to Interrogatory 1, and, if so, give their names and addresses and their connection, if any, with defendant.

ANSWER NO. 4: None.

Dated: New York, New York
June 29, 1976

MALDEN MILLS, INC.

By: 

COMMONWEALTH OF MASSACHUSETTS)
 : ss.:
 COUNTY OF *Essex*)

AARON FEUERSTEIN , being duly sworn, deposes and says:
 deponent is the *PRESIDENT* of Malden Mills Industries, Inc.,
 the corporation named in the within action; that deponent has
 read the foregoing Answers to Plaintiff's Interrogatories Served
 June 24, 1976 and knows the contents thereof; that the same
 is true to deponent's own knowledge, except as to the matters
 therein stated to be alleged upon information and belief, and as
 to those matters deponent believes it to be true.

This verification is made by deponent because Malden
 Mills Industries, Inc. is a foreign corporation. Deponent is an
 officer thereof, to wit, its *PRESIDENT*

E. Leonard J. Winters II (Deponent)

Sworn to before me this

29th day of June, 1976.

60

M

46 STAFFORD STREET LAWRENCE, MASS. 01041

ORIGINATOR

11:55 AM

No. 36299 - 65

Complete Purchase Order No. above
must appear on all invoices, bills of
lading, packages and correspondence

LAWRENCE SHIPMENT.
DELIVER VIA CHASE STREET ENTRANCE

10 -

VENDOR TO

Western, Inc.
22 Main St.
Westfield, Mass. 01085

*PLEASE FURNISH THE FOLLOWING IN EXACT ACCORDANCE WITH THIS ORDER AND CONDITIONS ON REVERSE HEREOF

DATE		DATE(S) REQUIRED	FOB	TERMS	SHIP VIA
10-2-75		RS	S/P	F/30	
ITEM	QUANTITY	M M CODE	DESCRIPTION		PRICES AND/OR DISCOUNT

Pattern #297

132.50

cc,

1. Repeat as large as possible.
2. Stagger fit and good trapping wherever possible.
3. Keep 3" empty on the sides of the screens.

ACCEPTED ORDER THE MERCHANDISE SPECIFIED HEREIN ON ALL THE TERMS SET FORTH ON THE FACE AND REVERSE SIDES HEREOF, INCLUDING ARBITRATION. THIS PURCHASE ORDER SUPERSEDES SELLER'S ORDER FORM, IF ANY, CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES, AND SHALL REMAIN A CONTRACT FOR THE ENTIRE QUANTITY ORDERED UPON YOUR DELIVERY TO US OF ANY PART OF THE MERCHANDISE SPECIFIED HEREIN, OR UPON ANY OTHER ACTION TAKING YOUR ASSENT HERETO.

INVOICE INSTRUCTIONS: 1. INVOICE IN TRIPLICATE 2. ATTACH COPY OF BILL OF LADING TO INVOICE 3. SHOW TERMS OF PAYMENT AND F.O.B. POINT

4. SHOW COMPLETE PURCHASE ORDER NUMBER

☐ Subject New Jersey Sales Tax

☐ Subject Vermont Sales Tax

Subject	Mass	Sales	Tax
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MALDEN MILLS, INC

☐ Exempt: New Jersey-Sales Tax☐ Exempt Vermont Sales Tax

	Exempt	Moss	Sales	Tax
100%				
90%				
80%				
70%				
60%				
50%				
40%				
30%				
20%				
10%				
0%				

Certificate No. 220-735-323

Certificate No 10071

UNDER SECTION 1 SUBSECTION 6

By

AUTHORIZED SIGNATURE

[illegible]

ACCOUNTS PAYABLE

24a

21 TEX INC.
22 Main Street
Westfield, Mass. 01085

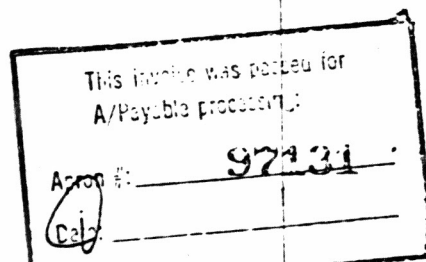
No. 4512

Date 11/26/75

SOLD TO: MALDEN MILLS, INC.
46 Stafford Street
Lawrence, Mass. 01841

SHIP TO: Same

OUR ORDER NO.	YOUR ORDER NO.	SALESMAN	TERMS	SHIPPED VIA	PPD. COLL.
0405	96238-65		30 Days	Wajer	X
QUANTITY	DESCRIPTION			PRICE	AMOUNT
4	Pattern #1197			133.50	534.50



ALL claims and returned goods MUST be accompanied by this bill.



SNAP A PART
47-104
MADE IN U.S.A.

Received by _____

Exhibit B

EXCERPTS FROM TRANSCRIPT OF HEARING ON
MARCH 19, 1976, ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

11 MR. STOLL: Do I have counsel's stipulation that
12 if plaintiff's copyright is valid that defendant's fabric
13 design is a direct infringement of plaintiff's copyrighted
14 fabric?

15 MR. GOLDBERG: By no means.

16 THE COURT: That is what I have to decide.

17 MR. GOLDBERG: No, your Honor, this is an unusual
18 case where we have already conceded that we made a copy of
19 a fabric that was made under license by the plaintiff
20 Greeff Fabrics.

21 It will be our position that the piece we copied,
22 which was made under the authority of the plaintiff, had no
23 copyright notice whatsoever and we never had any knowledge
24 that plaintiff or anyone else was claiming copyright in that
25 design, so that there is no question in this case about

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what was copied and, in fact, in our stipulation of agreed facts signed by counsel for both plaintiff and defendant, this is set forth.

MR. STOLL: I have asked a very particular question, though, your Honor. I said that assuming plaintiff's copyright is valid, does counsel stipulate that defendant's fabric design is an infringement of plaintiff's copyright?

THE COURT: Unless he has a license. That's his point here.

MR. STOLL: No, sir. Defendant's defense, if I may characterize it, goes to validity of the copyright and I am asking for --

THE COURT: That's not what I understand from the statement just now.

MR. GOLDBERG: Perhaps I didn't speak clearly. What defendant says is defendant got a piece of fabric, got several pieces of fabric embodying this design or a design similar to this design.

We have since learned that those pieces of fabric were made under license by plaintiff, therefore, under the authority of the plaintiff in the language of section 10 of the copyright statute. Those pieces had no copyright notice whatsoever anywhere on them. It was an additional piece with what we believed was an inadequate copyright

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2 notice but, in any event, we didn't see that until this
3 lawsuit was actually begun.

4 It is the position of the defendant that the
5 publication of that fabric without any copyright notice
6 worked a forfeiture of plaintiff's copyright in its design,
7 in particular since the defendant did not know and had no
8 way of knowing that plaintiff claimed copyright in this
9 design because of lack of notice.

10 Therefore, there is no question in this case
11 about what was copied. We will present to the court large
12 pieces of the fabric that was made under license by plaintiff
13 and the testimony of the witness from the defendant that
14 that is the fabric they copied. There is no question that
15 it was copied. But this fabric, that is, plaintiff's
16 Exhibit 1, which is its own copyrighted fabric, was never
17 seen by the defendant I believe to this very day.

18 THE COURT: All right.

19 MR. STOLL: We have counsel skirting around my
20 question, and although a determination of infringement is
21 up to your Honor, I think it would be much more convenient
22 if counsel would simply stipulate that the defendant's
23 fabric design is an infringement of the plaintiff's copy-
24 right, if indeed the plaintiff's copyright is valid.

25 Is it or is it not an infringement?

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2 THE COURT: I think that is a matter of law.

3 MR. GOLDBERG: Yes, your Honor.

4 THE COURT: And if he wants to stipulate it, it
5 is fine with me.

6 MR. STOLL: He has stipulated it is a copy of a
7 copy and that each of the three copies are the same, and I am
8 just asking him to use the word "infringement," your Honor.

9 MR. GOLDBERG: I think your Honor can do that
10 without my help.

11 MR. STOLL: That being the case, your Honor,
12 I must go into the question of infringement. I had hoped
13 to save a considerable amount of time and --

14 MR. GOLDBERG: Let me see if we can't --

15 THE COURT: The point of the matter is he is not
16 disputing this part you are attempting to prove now. What
17 he is saying is because of the circumstances in the case he
18 has, in effect, a defense against the infringement.

19 MR. GOLDBERG: Yes, your Honor.

20 THE COURT: So that that is his point. It was
21 not brought to their knowledge and it was given to him by a
22 licensee, and therefore, as far as they are concerned, al-
23 though technically it is an infringement, as far as this
24 particular person is concerned he is not legally responsible
25 because he didn't get the proper notice.

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2 MR. GOLDBERG: Yes, your Honor, and even further --

3 THE COURT: So I think you have got that on the
4 record and I don't see any need to go into it further than
5 that.

6 MR. STOLL: May I assume that I do not have to
7 make a showing of infringement?

8 THE COURT: I am telling you now that I find that
9 if in fact -- if witnesses were called that there would be
10 an infringement, but that there is a defense, if it is
11 predicated on cases that you can show to me, that this
12 person was not aware that this was copyrighted, that notice
13 was insufficient, and that it was gotten from a licensee
14 and therefore he has no responsibility.

15 MR. GOLDBERG: Your Honor, with only one correc-
16 tion, if I may. It was not received directly, I believe,
17 from the licensee, but it was made by the licensee under the
18 authority of plaintiff.

19 THE COURT: Who in turn sold it to someone else
20 and then got to your man.

21 MR. GOLDBERG: I believe yes, your Honor.

22 THE COURT: All right. On that state of facts,
23 then, I see no need for you to prove the infringement.
24 There would be one unless he could prove this defense.

25 MR. STOLL: Very good. With that, and with the

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prior stipulation that the copyright in suit is prima facie valid, I believe I could just about rest.

I would merely like to point your Honor's attention to the affidavit of Mr. Joe Hahn, attached to the moving papers, in which there is set forth the efforts which plaintiff has made to develop this design, the expense to which it has gone, although dollar figures are not mentioned, and damages are also set forth, although proof of damages on this type of motion are not necessary.

With that I would like to rest my case, although I would like an opportunity to rebut the defense.

MR. GOLDBERG: Your Honor, I call as a witness Milton Glasser.

THE COURT: I understand, then, that you are reserving your right to motion at the end of the petitioner's case.

MR. GOLDBERG: Yes, your Honor, if I may.

THE COURT: All right.

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Glasser-direct

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M I L T O N G L A S S E R, called as a witness by
Malden Mills Industries, Inc., having been first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Mr. Glasser, by whom are you employed?

A Malden Mills.

Q Is that the defendant in this case?

A Yes.

Q What is your position at Malden, Mr. Glasser?

A I am division manager of Print Division.

Q Mr. Glasser, I show you a piece of fabric marked
Plaintiff's Exhibit 2 and ask you if you have ever seen that
fabric design before?

A Yes, I have.

Q When was the first time you saw it?

A It was submitted to us from our sales office
who in turn received it from one of the customers for copy,
since it was not a copyrighted patent.

Q Well, you are going a little fast.

A Okay.

Q What did you, Mr. Glasser, see the first time
you saw this design?

A Well, it was a woven Jacquard piece of goods,

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Glasser-direct

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2 a one yard end.

3 Q That is one yard long?

4 A Yes. It was one yard lineal and the full width
5 of the goods including selvages.

6 Q Did you inspect that fabric?

7 A Yes, I did, both front and back.

8 Q What did you see, sir?

9 A There was no copyright notice on the fabric.

10 Q What did you do with that yard?

11 A Well, before sending it to the screenmaker,
12 we wanted to make sure about the repeat, that there wasn't,
13 by some freak, a copyright on this sample. We asked our
14 sales people to get a larger end and they sent us ten yards
15 of goods.

16 Q Mr. Glasser, I show you a roll of fabric which
17 has been premarked Defendant Exhibit A for identification
18 and ask you if you can identify it, sir?

19 A Yes, this is the 10 yard end that was sent to us
20 for our inspection.

21 Q This was the 10 yard piece?

22 A After the one yard end that we had received --
23 it was identical to the one yard end,

24 Q And did you inspect this when you received it, sir?

25 A Yes.

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Q What did you see?

A Well, we looked at both, or I looked at the back and the front, and all the selvages, of course, to see if there was any copyright notation on the fabric, and since there was none, we then proceeded with it.

Q Mr. Glasser, you say there was no copyright notice. Was there any notice, any writing whatsoever anywhere on the fabric?

A There was nothing on this piece of cloth.

Q That includes selvages, reverse side?

A Completely throughout.

Q Was there any ticket attached?

A There was no ticket attached to this end nor to the one yard end that we received.

MR. GOLDBERG: This is offered in evidence, your Honor.

THE COURT: Would you establish his expertise, his background.

MR. GOLDBERG: Sure.

Q Mr. Glasser, would you give your background in textiles?

A Okay. I graduated Lowell Textile Institute in 1939 and since that time have been employed and have been in my own business in varying forms of the textile industry.

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Glasser-direct

I run the complete print operation at Malden Mills, having been in this position for the last ten years.

Q Is this a print fabric, Mr. Glasser?

A No, it is not. This is a Jacquard woven cloth.

Q And the fabric that you made from this, is that a print?

A Yes, it is.

Q Was that made under your direct supervision?

A Yes, it was.

MR. GOLDBERG: We offer Defendant's Exhibit A in evidence.

MR. STOLL: If it please the court, I don't believe there has been any testimony on the origin of this fabric, the manner in which it was obtained, and I am not --

THE COURT: He did testify generally. He didn't specify what the names of the people were.

Suppose you establish who he got it from.

MR. GOLDBERG: Your Honor, Mr. Glasser's testimony is that he received this fabric and saw that it had no copyright notice on a full ten yard piece.

THE COURT: He received it from somebody, right?

MR. GOLDBERG: He did, your Honor, but let me say plainly that Malden would certainly rather not say whom they got it from unless that is relevant to some issue on

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Glasser-direct

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1 this motion. We believe it is not. Of course, if your
2 Honor so directs --

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4 THE COURT: I would take it at this time without
5 having to have the name, but did you ever examine this your-
6 self?

7 MR. STOLL: No, sir. The first time I saw it
8 was this morning.

9 THE COURT: All right. I will afford him the
10 opportunity to examine it and then later on if it becomes
11 material we can go into that.

12 (Pause.)

13 MR. STOLL: Your Honor, counsel has offered, at
14 my request, to provide me with approximately a one yard
15 specimen of this to take with me. Otherwise I really have
16 no way of examining it correctly or professionally.

17 THE COURT: You can examine it. Do you have any-
18 body here who knows anything about this business?

19 MR. STOLL: No, I do not.

20 THE COURT: They can look at it and see if there
21 is anything on there that they can see on the selvedge or
22 whatever the portion of it is -- I guess that's the end.

23 MR. GOLDBERG: Yes, the width end, your Honor.

24 THE COURT: That is where the copyright mark
25 would appear?

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Glasser-direct

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1 THE WITNESS: On the selvages.

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3 MR. GOLDBERG: If I may respectfully submit,
4 your Honor, this test is not what an expert would see but
5 what anybody would see looking at the fabric, including
6 your Honor.

7 THE COURT: He hasn't seen anything. He hasn't
8 unrolled it or looked at it. But he could get help from his
9 people as to where to go and look.

10 The point of the matter is I will give him
11 sufficient time to do that, anyhow.

12 MR. STOLL: I appreciate that, your Honor. The
13 fact is I have no idea of the source of this or the manu-
14 facture of this and no testimony on that has been offered.

15 THE COURT: Of course, that would be material at
16 the point of trial. What we are talking about now is a
17 preliminary matter and not the trial.

18 MR. STOLL: Subject to my examination, I would
19 not object, then, to this being entered.

20 THE COURT: Received subject to that condition.

21 MR. STOLL: Thank you, sir.

22 (Respectfully received Exhibit A received in evidence.)

23 BY MR. GOLDBERG:

24 Q Mr. Glasser, after you saw and examined this
25 ten yard piece which has been received in evidence as

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Glasser-direct

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2 Defendant's Exhibit A, what did you do, if anything?

3 A I sent the one yard end, which is the same as
4 that, to the screenmaker for manufacturing of the screens
5 from which we print the goods. It is a flat bed screen
6 operation.

7 Q Does that mean, Mr. Glasser, that your screen
8 printer would, in effect, make a copy of this design to use
9 as a master in producing larger quantities of fabric with
10 this print?

11 A Yes, that's right.

12 Q Now, sir, when was the next that you saw this
13 design outside of your own operations?

14 A I was at the Dallas Market and I saw this design
15 made in varying forms --

16 Q When was that, Mr. Glasser?

17 A In January of this year.

18 Q Please continue.

19 A -- on furniture. And it was made by people other
20 than this, than the people who made this woven one because
21 this was a print on a tufted piece of goods.

22 Q Mr. Glasser, I show you Plaintiff's Exhibit 1,
23 which is a piece of their fabric, of the plaintiff's fabric,
24 and ask is this what you saw at the Dallas show on pieces of
25 furniture?

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Glasser-direct

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2 A No, sir. This looks like a drapery material.
3 Nothing this light. Much heavier goods.

4 Q Do you know who made the other goods that you
5 saw, the other fabric you saw on this furniture?

6 A The other fabric that I saw, there is no way for
7 me to be a hundred percent sure, but the particular customer
8 that I asked said it was made by Disey Shamrock.

9 Q Do you know, does that company have anything to
10 do with the plaintiff?

11 A Not that I know of.

12 Q Did you see other fabrics at the same time
13 embodying this design?

14 A I saw this particular fabric.

15 Q When was the next time, Mr. Glasser, that you
16 saw this fabric?

17 A The next time I saw the fabric was after I had
18 notification that we were involved with some sort of infringe-
19 ment.

20 Q What notice was that, Mr. Glasser?

21 A It was a court notice that was served on our
22 New York office. They, in turn, called me and I think at
23 the same time got in touch with you.

24 Q Mr. Glasser, had you received any notice prior
25 to the service of those court papers that the plaintiff

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Glasser-direct

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Greeff was claiming that it owned a copyright in this design or that you were infringing their copyright or anything like that?

A No, not only that, I never heard of this firm before.

Q You never heard of the plaintiff Greeff before?

A That's rught.

Q Before this lawsuit was started?

A Right.

Q Now, sir, did you at that point, at my request, take any further step with respect to this fabric, after the lawsuit was started?

A At your request, in order to make sure that we didn't have by some chance a freak piece that had no identification on it, because of the shortness in time we made requests of our office in High Point and several of our salesmen spent the whole day running to get an end, and they came up with this five yard end which you have, and at your request also you asked if there were any kind of identifications on the roll, like hang tags or even wrappers that would indicate something, to send that along, too, and with this piece, as you see, there is a tag, too.

Q Mr. Glasser, I show you another piece of fabric, which has been premarked Defendant's Exhibit B for identi-

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Glasser-direct

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1 fication, and ask you if you can identify it, sir?

2 A Yes. This is the same pattern that appears on
3 there.

4 Q Mr. Glasser, with particular --

5 THE COURT: Wait a minute, the record isn't very
6 clear. He pointed to the other exhibit, namely respondent's
7 A.

8 MR. GOLDBERG: Thank you, your Honor.

9 Q Mr. Glasser, paying particular attention to the
10 reverse sides of the fabrics which make up Defendant's
11 Exhibit A and B, can you say whether they came from the
12 same piece?
13

14 A No, because you can see that they didn't shear
15 off the back of this one, on this five yard one, as they
16 did on the ten yard one.

17 MR. STOLL: May I ask if counsel intends to
18 request that Exhibit B for identification be entered?

19 MR. GOLDBERG: Yes.

20 MR. STOLL: Then I would like to object on the
21 same grounds that I objected as to Defendant's Exhibit A.

22 THE COURT: Received subject to the same con-
23 ditions.

24 (Respondent's Exhibit B received in evidence.)

25 Q Mr. Glasser, again, since there was this interval

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2 in comparing Defendant's Exhibit A and Exhibit B, the five
3 yard piece and the ten yard piece, can you say, sir, whether
4 they come from the same piece?

5 A They do not come from the same piece.

6 Q They do not?

7 A No.

8 Q And how do you know that, sir?

9 A Well, by inspection of the back of the cloth and
10 by feeling it. This one happens to be slightly heavier than
11 that one, but it is within mill tolerances, though it is off
12 of a different loom.

13 Q Mr. Glasser, did you examine this five yard
14 piece marked Defendant's Exhibit B?

15 A The minute that it was received, since time was
16 so short, it was run right out on our tables and we looked
17 under very strong light both back and front and selvages
18 to see if there was any marking of any copyright whatsoever.
19 The only thing we did see was, there was the tag stapled to
20 the edge of the piece, which we turned over, and there was
21 a rubber stamp on the back which states, "Fabric design
22 copyright by Greeff Fabrics Company, not a Greeff product."

23 Q Mr. Glasser, had you ever seen that notice
24 before?

25 A No.

1 jkcg Glasser-direct/cross 22

2 Q This was after the lawsuit was instituted?

3 A Yes, sir.

4 Q Until this lawsuit was instituted, Mr. Glasser --

5 MR. GOLDBERG: I think I asked that question.

6 I will withdraw that.

7 May I have a moment, your Honor?

8 (Pause.)

9 MR. GOLDBERG: I will wish your Honor to refer

10 to the piece ticket that is on this piece later, but I have

11 no further questions of this witness at this time.

17 MR. GOLDBERG: Your Honor, it is the defendant's
18 position that both of those fabrics were made with the
19 plaintiff's authorization and, in fact, attached to the
20 stipulation of agreed facts is a copy of a license agreement
21 between the plaintiff and Belle Fabrics, and I will want to
22 refer later to that agreement to show that even there the
23 plaintiff has virtually abandoned its copyright in failing
24 to take the necessary precautions to protect it.

6 25 THE COURT: This information is going to be

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2 reached at some point in time and as long as the witness
3 is here and if he knows we will allow him to answer the
4 question.

5 A I think what I answered before was that this was
6 within a mill's tolerance, that on different types of looms,
7 most mills don't have all identical looms and that loom and
8 this loom is doing the exact same colors, which is almost
9 an impossibility for another mill to do, but it is within
10 the same yarns, and the only difference it is the particular
11 loom that is making it slightly different, but it is within
12 a mill's tolerance, both fabrics -- if you put them together
13 I think you can see that.

14 Q The question was what was the name of the source
15 of your salesman's information?

16 MR. GOLDBERG: Your Honor, is that any longer of
17 any relevance?

18 THE COURT: If he knows I will allow him to
19 answer. I don't know if he knows.

20 THE WITNESS: I don't know that because all I
21 asked for was to get me some yardage.

22 THE COURT: If you don't know, that's the answer.

23 THE WITNESS: I don't, no.

24 THE COURT: But you have discovery and everything
25 else after this is over to come to find out what the actual

BEST COPY AVAILABLE

24 Q May I ask the purpose, Mr. Glasser, on Petitioner's
25 Exhibit 2 for the Malden copyright notice to appear?

jkcg

Glasser-cross

33

1
2 A That is not a copyright. That just says strike-
3 off.

4 Q What is the symbol between the word "Malden" and
5 "strike-off"?

6 A I don't know. We have had that for years.
7 We pu' that on the back of all our cloths so that our sales-
8 men will not show it as being actual production, and it is
9 repeated over and over so that in no way can you get a
10 swatch and leave it with a customer as that was.

11 MR. STOLL: Counsel, was a copyright notice on
12 the back?

13 THE COURT: You mean the letter C?

14 MR. STOLL: The letter C in the circle with the
15 name Malden?

16 MR. GOLDBERG: Your Honor, is counsel --

17 THE COURT: You can argue that. It is in
18 evidence. I don't know that there need to be any stipulations
19 in that area.

AFFIDAVIT OF ROBERT S. STOLL
DATED MARCH 26, 1976, and
ANNEXED EXHIBITS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GREEFF FABRICS, INC., :
Plaintiff, :
-against- : 76 Civ. 1188 (JMC)
MALDEN MILLS INDUSTRIES, INC., :
Defendant. :
-----X

AFFIDAVIT OF ROBERT S. STOLL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT S. STOLL, being duly sworn, deposes and says:

I am one of plaintiff's attorneys in the above-identified action and I submit this affidavit in support of plaintiff's motion for a preliminary injunction and in reply to defendant's contention that a single copyright notice on a roll of fabric approximately 50 yards in length, having a repeat design, is insufficient.

On March 25, 1976, I caused an application for registration of a wall covering design copyright to be delivered to the Copyright Office. The specimens submitted were each a full roll of wall covering, having a repeat design, and each bearing a single copyright notice. As set forth in a covering letter to the Register of Copyrights, a copy of which is hereto annexed as Exhibit A, the full roll of wall covering is the smallest commercial unit in which such is sold and such wall covering is sold only in full-roll

Pursuant to my request, the Copyright Office promptly examined and considered the application for registration, and granted and issued Copyright Registration No. Gp 105475 thereon. A copy of said registration is annexed hereto as Exhibit B. A third full roll of wall covering, identical to the specimens submitted in support of the application for registration and containing the same single copyright notice, is submitted herewith as Exhibit C.

This affidavit and exhibits are submitted as evidence of the established policy and practice of the Copyright Office as to registration of goods having a repeat design format in which a single copyright notice is applied to the smallest commercial unit of such goods.

The reason that wall covering rather than fabric was submitted for registration is that fabric with a single copyright notice was not available for the purpose. (Plaintiff's own fabric is imprinted with a copyright notice on the selvedge at each repeat of the pattern.) The principle for which such wall covering was submitted is equally applicable to fabric in which a full roll is the smallest commercial unit sold, see paragraph 4 of the affidavit of J. Lewkowicz.

This is not a novel principle. It has been applied to a pair of earrings (Boucher v. Du Boyes, 253 F.2d 948, 949, 2 Cir. 1958, cert. den. 357 U.S. 936), two repeats on a blouse (Scarves By Vera v. United Merchants and Manufacturers, 173 F.S. 625, 628, D.C. S.D. N.Y. 1959), cartoon characters in bound leaf form (Fleischer Studios v. Freundlich, 73 F.2d 276, 278, 2 Cir. 1934, cert. den. 294 U.S. 717), multiple reel motion picture (Patterson v. Century Productions, 93 F.2d 489, 493, 2 Cir. 1937), directory with enclosed map (Lydiard-Peterson Co. v. Woodman, 204 F.2d 921, 924, 8 Cir. 1913), a three-piece Santa Clans figure (Doran v. Sunset House Distributing Corp., 197 F.S. 940, 947, D.C. Cal., aff'd. 304 F.2d 251).

Robert S. Stoll

Sworn to before me this
26th day of March, 1976

SAMUEL J. STOLL
NOTARY PUBLIC, State of New York
No. 31-3805725, New York County
Term Expires March 30, 1977

Notary Public

Certificate

Registration of a Claim to Copyright

in a work of art or a model or design for a work of art

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Barbara Rieger

Register of Copyrights
United States of America

FORM G

REGISTRATION NO

GP 105475

DO NOT WRITE HERE

CLASS

G



1. Copyright Claimant(s) and Address(es):

Name Manuscreens, Inc.

Address 58-38 Page Place, Maspeth, New York 11378

Name

Address

2. Title: GRAND FLEUR

(Title of the work)

3. Nature of Work: wall covering design

(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy)☐ Weight (in pounds)☐ Size (give dimensions)☐ Fragility (give details)

5. Author (i.e., Artist):

Name Manuscreens, Inc.

Citizenship U.S.A.

(Legal name followed by pseudonym if latter appears on the copies)

(Name of country)

Domiciled in U.S.A. Yes ☒ No ☐ Address 58-38 Page Place, Maspeth, New York 11378

6. (a) Date of Publication:

August 1, 1967

(Month)

(Day)

(Year)

(b) Place of Publication:

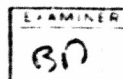
U.S.A.

(Name of country)

(c) Manufacture Outside United States by Lithographic or Photoengraving Process:

(Name of country)

7. Previous Registration or Publication:

Was work previously registered? Yes ☐ No ☐ Date of registration _____ Registration number _____Was work previously published? Yes ☐ No ☐ Date of publication _____ Registration number _____Is there any substantial NEW MATTER in this version? Yes ☐ No ☐ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version

Complete all applicable spaces on next page

STOLL AND STOLL

9. Send correspondence to:

Name **STOLL AND STOLL** Address
EMPIRE STATE BUILDING

10. Send certificate to:
NEW YORK NEW YORK 10001

(Type or
 print Name
 name and
 address) Address

STOLL AND STOLL

EMPIRE STATE BUILDING

NEW YORK, NEW YORK 10001

(Number and street)

(City)

(State)

(ZIP code)

Information concerning copyright in works of art

When to Use Form G. Form G is appropriate for unpublished and published works of art, and models and designs for works of art.

What Is a "Work of Art"? This category (Class G) includes works of the fine arts, and works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned. Common examples of works of art are

paintings, drawings, sculpture, ceramics, artistic jewelry, original designs applied to textiles, and the like.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

Unpublished works of art

How to Register a Claim. To obtain copyright registration, mail to the Register of Copyrights, Library of Congress, Washington, D.C. 20559, a photograph or other identifying reproduction of the work, an application on Form G, properly completed and signed, and a fee of \$6. Deposits are not returned, so do not send your only copy.

Procedure to Follow if Work Is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published edition must contain a copyright notice in the required form and position.

Published works of art

What Is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. Unrestricted public exhibition of a work of art may also constitute publication.

How to Secure Copyright in a Published Work of Art

1. Produce copies with copyright notice.
2. Publish the work.
3. Register the copyright claim, following the instructions on page 1 of this form.

The Copyright Notice. In order to secure and maintain copyright protection in a published work, it is essential that all copies published in the United States contain the statutory copyright notice. The notice should ordinarily consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner. The year date of publication may be included in the notice, but normally it is not required.

—Alternative Form of Notice. As an alternative, the notice for works of art may consist of the symbol ©, accompanied by the initials, monogram, or mark of the copyright owner, provided the owner's name appears on some accessible part of the copies.

—Universal Copyright Convention Notice. Use of the symbol © with the name of the copyright owner and the year date of publication may result in securing copyright in countries which are parties to the Universal Copyright Convention, which protection might not be obtained by use of either of the alternative forms of notice. Example: © John Doe 1974.

Optional Deposit. For certain published works, it may be impractical to deposit actual copies because of their size, weight, fragility, or monetary value. In such cases the Register of Copyrights may permit the deposit of photographs or other reproductions instead of the actual copies, under conditions specified in the Copyright Office Regulations. If the optional form of deposit is used, it will be necessary: (1) to fill out line 4, on pages 1 and 3; and, (2) to deposit photographs or other identifying reproductions of the work. For more detailed information, write to the Copyright Office.

If you consider that first publication of your work took place by means of its unrestricted public exhibition with copyright notice, you may deposit photographs of the work.

NOTE: If copies are published without the required notice, the right to secure copyright is lost and cannot be restored.

FOR COPYRIGHT OFFICE USE ONLY		
Application received 25 MAR 1975	Two copies received 25 MAR 1975	Photographs or reproductions received
One copy or reproduction received		
Fee received		

Exhibit B

STOLL AND STOLL
ATTORNEYS AT LAW
EMPIRE STATE BUILDING
NEW YORK, NEW YORK 10001

PATENTS, TRADEMARKS
COPYRIGHTS

SAMUEL J. STOLL
ROBERT S. STOLL

DORIS S. HOFFMAN

212 PENNSYLVANIA 6-0290
CABLE: ATTYSTOLL NEWYORK

March 25, 1976

Honorable Register of Copyrights
The Library of Congress
Washington, D. C. 20559

Dear Madam:

Submitted herewith for registration are two rolls of wall covering, each bearing a single copyright notice. The wall covering in question is sold only in full-roll quantities, and a full roll as submitted is the smallest commercial unit sold.

It is desired to use the registration requested as evidence in litigation involving litigants other than applicant and a different copyright registration. A request has been made to the Court to open until Friday, March 26, 1976 the time within which to file an affidavit pertaining to the registration sought. Accordingly, it is respectfully requested that the enclosed application be given immediate consideration and that the registration be issued, today if possible. Because the court proceeding is on a motion for a preliminary injunction, time is quite important and the cooperation of your Office is respectfully solicited.

Thank you very much.

Respectfully yours,

[Signature]
Robert S. Stoll
Attorney for Applicant

RSS/gk
Enc.

MEMORANDUM DECISION OF APRIL 13, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

GREEFF FABRICS, INC., :

Plaintiff, :

MEMORANDUM
DECISION

-against- :

MALDEN MILLS INDUSTRIES, INC., :

76 Civ. 1188
(JMC)

Defendant. :

-----X

A p p e a r a n c e s :

Stoll and Stoll, New York City (Robert S.
Stoll, Esq., of counsel), for plaintiff.Kreindler, Relkin & Goldberg, New York
City (George E. Goldberg, Esq., of counsel), for
defendant.CANNELLA, D.J.:

Application by Greeff Fabrics, Inc. ("Greeff"), plaintiff herein, for a preliminary injunction enjoining defendant Malden Mills Industries, Inc. ("Malden"), pending final determination of this action from manufacturing, converting, selling or distributing textiles bearing a reproduction of the copyrighted work of art known as "58710-13 Contemplation" is denied. Jurisdiction is vested in this Court pursuant to 17 U.S.C. §112 and 28 U.S.C. § 1338.

54a
FACTS^{1/}

Petitioner states that it is "one of the leading designer fabric houses in the world,"^{2/} maintaining a large design studio in order to "offer the finest reproduction of original works of art" which it has created or purchased.^{3/}

The design here in issue, first published on August 15, 1974, was filed with the Register of Copyrights and granted Copyright No. Gp 93648 on September 13, 1974.^{4/} Since August 15, 1974, all copies of the "Contemplation" design published by plaintiff have been published in strict conformity with the applicable copyright laws. However, some time prior to the fall of 1975, petitioner discovered a textile fabric called "Camelot," produced and sold by Belle Fabrics, Inc. ("Belle"), which embodied its copyrighted "Contemplation" design.

Greeff initiated legal proceedings against Belle for copyright infringement and on October 20, 1975 that litigation terminated in a consent judgment and agreement whereby petitioner, at Belle's request, granted Belle a limited license to continue selling fabric embodying the subject design for a phase-out period to be completed on or before May 1, 1976. The agreement contains an additional proviso requiring Belle to place a Greeff copyright

notice on all fabric sold or displayed by Belle bearing the "Contemplation" design.^{5/}

The affidavit of Jerimiah Leskiewicz, Belle's president, details Belle's attempts to comply with the notice requirement of the licensing agreement. Using a rubber stamp provided by Greeff's attorney, the copyright notice^{6/} was applied to a hang tag which was then affixed to each and every roll of "Camelot" fabric sold by Belle.^{7/}

It is respondent's position that its challenged fabric design was innocently copied from a sample of "Camelot" fabric which bore no copyright notice. Milton Glasser, a Malden employee, testified that Malden's first exposure to the Belle fabric occurred when one of his customers gave him a piece of the Belle fabric, approximately one yard long and selvage to selvage in width, and asked him to copy the design. This swatch contained no copyright notice. Before copying this design, respondent instructed its salesmen to search the market to see if anyone was reserving rights in the fabric. They returned with a piece of the same fabric, this one approximately ten yards long (Respondent's Exhibit A). No copyright notice appeared anywhere on this piece, nor on any tag attached thereto.^{8/} Concluding that the fabric design was

in the public domain, respondent copied it and placed its product on the market. On March 11, 1976 Greeff instituted this suit, charging Malden with infringing the copyright on its "Contemplation" design. The instant application was made shortly thereafter

DISCUSSION

In an infringement case a preliminary injunction should issue if petitioner can show "a reasonable probability of prevailing on the merits." *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969) (per curiam). Generally, this burden is satisfied by a prima facie showing that petitioner is the holder of a valid copyright and that the defendant has infringed. *E.g.*, *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409, 411 (2d Cir. 1970), cert. denied, 401 U.S. 977 (1971); *Leon B. Rosenblatt Textiles Ltd. v. M. Lowenstein & Sons, Inc.*, 321 F.Supp. 186, 187 (S.D.N.Y. 1970) (Cooper, J.). For purposes of this motion respondent nowhere contests the originality of petitioner's design, the issuance of a valid copyright to petitioner, or the allegation that it has marketed fabrics bearing a facsimile of the design in question without obtaining petitioner's permission. Respondent's principal contention is that the copyright notice required by § 10 of the copyright law^{9/} was omitted

from the Belle fabric bearing the "Contemplation" design; this omission resulted in dedication of the design to the public domain and consequent forfeiture of copyright protection.

Was the notice affixed to the Belle fabric sufficient under the statute?

When the statutory notice is not affixed to an article which is then passed into the stream of commerce, the copyright holder forfeits his rights under the copyright and the article may be freely copied by others.^{10/} Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960); Irving J. Dorfman Co. v. Borlan Industries, Inc., 309 F.Supp. 21, 24 (S.D.N.Y. 1969) (Lasker, J.); American Fabrics Co. v. Lace Art, Inc., 291 F.Supp. 589, 590 (S.D.N.Y. 1968) (Motley, J.); 1 Nimmer on Copyright § 82 at 302 (1975). However, there is much debate as to what the appropriate statutory notice is with respect to a repeating fabric design. The Copyright Act states that the notice "shall be affixed to each copy" of the protected work. 17 U.S.C. § 10. But "[b]ecause of the continuous nature of the composite design printed on [certain fabrics] there are conceptual difficulties in determining the limits of the protected 'work' and the number of 'copies' thereof contained in a

bolt" of the finished product. H.M. Kolbe Co. v. Armigus Textile Co., 315 F.2d 70, 72 (2d Cir. 1963).

Petitioner contends that a single copyright notice on an entire roll of material containing a repeating fabric design is sufficient notice.^{11/} On the other hand, respondent argues that where such continuous fabric designs are concerned, a notice of copyright is required at least once for each repetition of the entire design.^{12/} Although the oft-questioned decision of the Supreme Court in Louis Dejonge & Co. v. Breuker & Kessler, 235 U.S. 33 (1914) is strong authority for the latter proposition, we are aware of no decision which has expressly applied such a rule. However, the weight of authority does indicate that the notice must appear at frequent intervals on the selvage or throughout the design itself. H.M. Kolbe Co. v. Armigus Textile Co., 315 F.2d 70, 73 (2d Cir. 1963) (notice appearing at least once for every repetition of the design is sufficient); Judscott Handprints, Ltd. v. Washington Wall Paper Co., 377 F.Supp. 1372 (E.D.N.Y. 1974) (eighteen inch long notices appearing at 3-3/4" intervals of the selvage of a fifteen inch repeating fabric design is sufficient although notice appears less than once for each repetition of the design);

Klauber Brothers, Inc. v. Westchester Lace Works, Inc., 181 U.S.P.Q. 523 (S.D.N.Y. 1974) (single notice at beginning of spools of lace ranging in length from 100 to 500 yards seriously questioned); Leon B. Rosenblatt Textiles Ltd. v. M. Lowenstein & Sons, Inc., 321 F.Supp. 186, 189 (S.D.N.Y. 1970) (notice required at least once for each turn of the roller that prints the design); United Merchants and Manufacturers, Inc. v. Sutton, 282 F.Supp. 588, 590 (S.D.N.Y. 1967) (notice on selvage of each "repeat" of goods is sufficient); United Merchants and Manufacturers, Inc. v. Sarne Co., 278 F.Supp. 162, 165 (S.D.N.Y. 1967) (notice on the selvage of the fabric at every 27 inch "repeat" of the design is sufficient); Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 244 F.Supp. 287, 289-90 (S.D. Fla. 1965) (statutory notice appearing on the selvage once for each repeat of a 30 inch design sufficient); John Wolf Textiles, Inc. v. Andris Fabrics, Inc., 139 U.S.P.Q. 365, 367 (S.D.N.Y. 1962) (notice conspicuously printed on selvage of every yard of goods sufficient); Peter Pan Fabrics, Inc. v. Puritan Dress Co., 207 F.Supp. 563 (S.D.N.Y. 1962) (notice printed on the selvage at nineteen inch intervals sufficient); Peter Pan Fabrics, Inc. v. Candy Frocks, Inc., 187 F.Supp. 334, 336 (S.D.N.Y. 1960) (statutory requirement is met where notice is imprinted at

least once for every repeat of the design).^{13/} Furthermore, although no court has gone as far as respondent suggests, it is clear that with respect to repetitive designs imprinted on a continuous roll of material the "copies" of the work deposited by the author with the Register of Copyrights pursuant to 17 U.S.C. § 13 set the "outer limit within which published copies must bear the statutory notice." *H.M. Kolbe Co. v. Armigus Textile Co.*, 315 F.2d 70, 73 (2d Cir. 1963). Accord, *Klauber Bros., Inc. v. Westchester Lace Works, Inc.*, 181 U.S.P.Q. 523, 524-25 (S.D.N.Y. 1974) (Metzner, J.). Since petitioner's officially-deposited copies are less than three yards in length^{14/} the single copyright notice affixed by Belle to the fifty-yard rolls it produced is insufficient to protect Greeff's copyright.^{15/}

Petitioner attempts to avoid this result by arguing that it is not responsible for Belle's failure to affix an adequate copyright notice to its infringing product.^{16/} It is to this contention that we now turn.

Was Belle's publication "authorized" by Greeff?

The requirement of Section 10 of the Copyright Act that proper notice be affixed to the original and each copy of a copyrighted work as published is applicable only

with respect to authorized publications. Thus a publication devoid of notice will not effect a forfeiture of the copyright "unless it is shown that such publication occurred by or under the authority of the copyright proprietor." *Judscott Handprints Ltd. v. Washington Wall Paper Co.*, 377 F.Supp. 1372, 1378 (E.D.N.Y. 1974) (quoting from 1 *Nimmer on Copyright* § 82 at 303); accord, *H.M. Kolbe Co. v. Armus Textile Co.*, 315 F.2d 70, 73-75 (2d Cir. 1963). Petitioner contends that under the doctrine enunciated by the Second Circuit in *Kolbe*, supra, the unnoticed publications by Belle herein were unauthorized publications. In *Kolbe* the court of appeals held that where, as part of a settlement agreement, the owner of a textile design copyright consents to the sale of garments manufactured from fabrics embodying the infringing design as to which manufacture has already begun, such consent does not constitute authorization within the meaning of 17 U.S.C. § 10 and thus will not result in copyright forfeiture upon subsequent publication of such "copies" without proper notice. The court reasoned that "mere acquiescence in a course of action [the copyright proprietor] was powerless to control" and that in any event "was clearly a part of a larger endeavor to limit the

infringing sales . . . insofar as that could be accomplished by an out-of-court settlement" did not rise to the level of "authorization" under the Act. 315 F.2d at 75.

A like result was reached in Judscott, supra, where pursuant to a settlement agreement a license was granted subject to the condition that the licensee would affix a copyright notice to all previously made infringing copies. An issue of fact arose as to whether the copyright owner had acquiesced in any publications lacking the requisite notice. Finding no proof of acquiescence, the court indicated that even if the opposite were true, under the Kolbe doctrine publication of such improperly noticed copies would not result in dedication of the copyright design to the public domain. 377 F.Supp. at 1378-79.

On the present state of the record the Court is unable to make a final determination as to whether the instant situation falls within the ambit of the foregoing limited exception to the copyright notice requirement. The evidence adduced to this point indicates that the instant licensing agreement, although executed in settlement of pending litigation, goes far beyond those in Kolbe and Judscott. In addition to allowing disposal of

infringing material already on hand, the agreement apparently contemplates continued production of fabric embodying the copyrighted design.^{17/} Furthermore, petitioner seems to have been aware of Belle's method of affixing the copyright notice to the infringing fabric, since its own attorney supplied the rubber stamp to be used for this purpose.^{18/} These facts strongly indicate that Greeff did authorize Belle's inadequately noticed publications.

However, the Court need not express any views as to the ultimate merits of each party's position on this issue. At the present stage of the proceedings there exist serious questions regarding the continuing validity of petitioner's copyright. Such being the case, petitioner has not satisfied its burden of establishing a reasonable probability of ultimate success on the merits. *Klauber Brothers, Inc. v. Westchester Lace Works, Inc.*, 181 U.S.P.Q. 523, 525 (S.D.N.Y. 1974) (Metzner, J.); *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278 (S.D.N.Y. 1971) (Motley, J.); *Irving J. Dorfman Co. v. Borlan Industries, Inc.*, 309 F.Supp. 21, 25 (S.D.N.Y. 1969) (Lasker, J.); *American Fabrics Co. v. Lace Art, Inc.*,

cha

291 F.Supp. 589, 590 (S.D.N.Y. 1968) (Motley, J.).

Accordingly, the motion for a preliminary injunction must be denied.

SO ORDERED.

/s/ _____
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
April 12, 1976.

FOOTNOTES

- 1/ The essential facts herein are largely undisputed. Solely for purposes of this motion, many have been stipulated to and incorporated in Court Exhibit 1.
- 2/ Affidavit of Richard C. Johann, President of Greeff, March 10, 1976 ¶2 (hereinafter "Johann Affidavit"). Designer fabrics are defined as those "used by the interior designing trade to professionally decorate the interiors of homes, offices and dignified commercial establishments such as hotels with drapery, upholstery for furniture, bedspreads and the like." Id.
- 3/ Johann Affidavit ¶¶ 3, 4.
- 4/ See Exhibit 1 annexed to the complaint.
- 5/ The agreement is annexed as Exhibit A to the Court Exhibit 1.
- 6/ Fabric Design Copyright
© by Greeff Fabrics, Inc.
Not a Greeff product.
- 7/ Belle apparently sold this fabric in entire rolls and did not cut the material for sale in smaller quantities. It did, however, distribute samples of the "Camelot" fabric, to which it stapled white cards bearing the stamped copyright notice.
- 8/ Although petitioner does not concede that respondent's Exhibit A is Belle fabric, the evidence presently before the Court strongly indicates that in fact it is.
- 9/ 17 U.S.C. § 10.
- 10/ The threshold question is whether the proper copyright notice was affixed when the goods left the copyright proprietor's

control, and it is not fatal if others thereafter removed the required notice. *Gerlach-Barklow Co. v. Morris & Bandien, Inc.*, 23 F.2d 159, 162 (2d Cir. 1927); *Irving J. Dorfman Co. v. Borlan Industries, Inc.*, 309 F.Supp. 21, 24 (S.D.N.Y. 1969) (Lasker, J.).

Section 10 does not impose upon copyright proprietors the duty of policing pirated works. Only goods sold "by authority of the copyright proprietor" are required, lest the copyright owner lose the copyright protection that is his, to carry the statutory notice. Normally, of course, the copyright owner will have discharged his obligation in this respect by seeing that each copy of the protected work has the notice affixed to it at the time it leaves his control. Therefore, the fact that unmarked copies of a work have somehow come into the possession of one whom the copyright owner alleges to be an infringer will not, without more, justify the denial of an injunction to protect the copyright owner from further unauthorized distribution.

H.M. Kolbe Co. v. Armigus Textile Co., 315 F.2d 70, 74 (2d Cir. 1963). The burden of proving that the statutory notice was not affixed to the article when it entered the stream of commerce rests on the alleged infringer. *Stuff v. E.C. Publications, Inc.*, 342 F.2d 143 (2d Cir.), cert. denied, 382 U.S. 822 (1965); *Irving J. Dorfman Co. v. Borlan Industries, Inc.*, 309 F.Supp 21, 24 (S.D.N.Y. 1969) (Lasker, J.); *United Merchants and Manufacturers, Inc. v. Sarne Co.*, 278 F.Supp. 162, 164 (S.D.N.Y. 1967) (Mansfield, J.).

11/ In support of this position petitioner advises the Court that the Register of Copyrights has accepted for registration an entire roll of wall covering, approximately 4-1/4 yards long (Belle sells fabric embodying petitioner's "Contemplation" design in rolls approximately fifty yards long) containing only one copyright notice, the argument being that if the Register of Copyrights deems one notice sufficient for an entire roll of a product that contains a repeating design, that is all that the Act requires. Regardless of the efficacy of this argument in a case wherein the fabric was so registered, the Court finds

it inapplicable to the case presently before it. The two bolts of fabric embodying the instant design which were submitted to the Register of Copyright by petitioner were between one and three yards long, not entire rolls. This is crucial to the determination of the appropriate notice under the Kolbe case, see notes 11-15 and accompanying text, infra. Furthermore, there is nothing in the record to suggest a similarity between wall covering and a repeating fabric design.

12/ Petitioner's fabric design repeats every 25-1/2 inches.

13/ An examination of the above authorities reveals that determination of the sufficiency of copyright notice, within the limits to be discussed below, is done on an ad hoc basis.

14/ Court Exhibit 1 ¶ 3.

15/ Of course, this Court does not consider the size of the copy deposited by the copyright proprietor to be the sole measure of the scope of a protected textile design. To do so "would mean that a single notice, if sufficiently legible, would suffice for the whole bolt . . . this were what [an owner] purported to copyright." Kolbe, infra, 315 F.2d at 73 (quoting from H.M. Kolbe Co. v. Armigus & Belle Co., 279 F.2d 555, 557 (2d Cir. 1960) (Friendly, J., dissenting)).

16/ Petitioner does not contend that the omissions of the copyright notice were limited to a very small percentage of the fabric sold or due to inadvertance or accident, circumstances which would excuse lack of notice under 17 U.S.C. § 21.

17/ The agreement allows Belle to "conduct the orderly sale of its infringing fabric, designated as 'Camelot', by continuing in its usual business concerning this line through May 1, 1976 only and by phasing-out that fabric." Agreement between Greeff Fabrics, Inc. and Belle Fabrics, Inc. dated October 20, 1975 ¶ 2.

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18. In fact, Greeff has made no attempt to contradict this assertion.

ORDER OF MAY 10, 1976, DENYING PLAINTIFF'S
MOTION FOR REARGUMENT AND RENEWAL OF MOTION
FOR PRELIMINARY INJUNCTION

May 10, 1976

Plaintiff's motion to reargue and renewed motion
for a preliminary injunction are denied. The parties are
directed to prepare for trial as expeditiously as possible.

So Ordered.

/s/ John M. Cannella
U. S. D. J.

[Handwritten original not easily reproduceable.]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

(Attach additional sheets if space is not sufficient)

APPEAL FROM DISTRICT COURT

DISTRICT ► Southern District of
New York

DISTRICT COURT
DOCKET NUMBER 76 Civ. 1188(JMC)

DATE FILED IN DISTRICT COURT ▶ MO. DAY YEAR
March 11, 1976

DATE NOTICE OF
APPEAL FILED : August 17, 1976

RELATED CASE(S) ▶

Is this a cross appeal ☐ YES ☒ NO

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Kreindler, Relkin & Goldberg

NATURAL SUIT

METHOD OF DISTRICT COURT DISPOSITION

CONTRACT		TOOLS		ACTION UNITS & STATUTES			
				CIVIL RIGHTS	DISPER/TOLERABILITY	PROPERTY RIGHTS	
<input type="checkbox"/> INSURANCE	<input type="checkbox"/> FEDERAL RESERVE	<input type="checkbox"/> VOTING	<input type="checkbox"/> ADDRESS/TURN	<input type="checkbox"/> COPY RIGHT	<input type="checkbox"/> TRADE MARK		
<input type="checkbox"/> MARINE	<input type="checkbox"/> A-PLACES	<input type="checkbox"/> JURY	<input type="checkbox"/> PENDING SUIT	<input type="checkbox"/> STATE	<input type="checkbox"/> TRADE MARK		
<input type="checkbox"/> MILLER ACT	<input type="checkbox"/> ARMY & LAND B. PLACES	<input type="checkbox"/> ARREST/TURN	<input type="checkbox"/> VOUCHER & BOND	OTHER STATUTES			
<input type="checkbox"/> NEGOTIABLE INSTRUMENT	<input type="checkbox"/> FEDERAL LAND, B. PLACES C. PLACES	<input type="checkbox"/> RELEASE	<input type="checkbox"/> A. B. & C. PLACES	<input type="checkbox"/> STATE PROPERTY TAXES	<input type="checkbox"/> ARMY & LAND B. PLACES		
<input type="checkbox"/> RECEIPT OF PROPERTY	<input type="checkbox"/> MARINE	<input type="checkbox"/> OTHER CIVIL RIGHTS	<input type="checkbox"/> A. B. & C. PLACES	<input type="checkbox"/> STATE PROPERTY TAXES	<input type="checkbox"/> ARMY & LAND B. PLACES		
<input type="checkbox"/> OTHER CONTRACT	<input type="checkbox"/> OTHER REAL ESTATE, PROPERTY	<input type="checkbox"/> PROSECUTIVE OFFICE	<input type="checkbox"/> OTHER	<input type="checkbox"/> BANKING AND CREDIT	<input type="checkbox"/> STATE PROPERTY TAXES		
REAL PROPERTY		LABOR		<input type="checkbox"/> COMMERCIAL BANKING, ETC.	<input type="checkbox"/> STATE PROPERTY TAXES		
<input type="checkbox"/> CONVEYANCE	<input type="checkbox"/> FEDERAL PROPERTY	<input type="checkbox"/> VOTING RIGHTS	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> STATE PROPERTY TAXES		
<input type="checkbox"/> FEDERAL LAND	<input type="checkbox"/> OTHER REAL ESTATE, PROPERTY TAXES	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> STATE PROPERTY TAXES		
<input type="checkbox"/> REAL ESTATE RIGHTS	<input type="checkbox"/> OTHER REAL ESTATE, PROPERTY TAXES	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> STATE PROPERTY TAXES		
<input type="checkbox"/> TOOLS TO LABOR	<input type="checkbox"/> OTHER REAL ESTATE, PROPERTY TAXES	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> STATE PROPERTY TAXES		
<input type="checkbox"/> ALL OTHER REAL PROPERTY	<input type="checkbox"/> OTHER REAL ESTATE, PROPERTY TAXES	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> LABOR UNION	<input type="checkbox"/> STATE PROPERTY TAXES		

Judgment before trial		Prisoner petition	
Summary Judgment	<input type="checkbox"/>	Granted	<input type="checkbox"/>
Dismissal	<input type="checkbox"/>	Denied	<input type="checkbox"/>
Other	<input type="checkbox"/>		
Judgment during or after trial		Injunction	
Court trial	<input type="checkbox"/>	Granted	<input type="checkbox"/>
Jury trial	<input type="checkbox"/>	Denied	<input checked="" type="checkbox"/>
During trial	<input type="checkbox"/>		
Appeal from order		Damages	
Preliminary injunction	<input type="checkbox"/>	Granted	<input type="checkbox"/>
Class action	<input type="checkbox"/>	Amount	<input type="text"/>
Amend answer	<input type="checkbox"/>	\$	<input type="text"/>
Enforce settlement	<input type="checkbox"/>	Denied	<input checked="" type="checkbox"/>
Counsel fees	<input type="checkbox"/>	Other relief (specify)	
Stay	<input type="checkbox"/>		
Other	<input type="checkbox"/>		

APPROXIMATE SIZE OF RECORD ▶

NUMBER OF EXHIBITS ▶

HAS TRANSCRIPT BEEN MADE ? YES ☒ NO ☐

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW.

Action for copyright infringement.
Action for violation of Section 43(a) of the Lanham Act.

Action dismissed.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

See attached statement of issues proposed to be raised on appeal.

I, Attorney for the Appellant, hereby certify that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript (FRAP 10 (b)). (Check one box)

1 (1) have already ordered the transcript to be prepared OR

☐ (1) have already ordered the transcript to be prepared OR

COUNSEL'S SIGNATURE

DATE August 25, 1976

ISSUES PROPOSED TO BE
RAISED ON APPEAL

1. Is it a defense to an action for infringement of a copyright on a fabric design to show use of an allegedly insufficient copyright notice by a licensee of the copyright owner, where, as here, the defendant charged with the infringement did not rely on the insufficient notice when it undertook to copy the copyrighted design and was actually unaware of the insufficient notice until after the infringement action was instituted, and where, as here, there is no showing that the public ever relied on or was misled by or was even aware of the insufficient notice?

2. Is a copyright on a fabric design forfeited when, in settlement of an earlier action for infringement of the copyright, the copyright owner, on the infringer's urgent plea, licensed the infringer to continue to sell fabric embodying the copyrighted design and required him to place a copyright notice "on all of the [licensed] fabric or reproductions thereof sold or displayed in any form", and where the infringer-licensee failed to apply the copyright notice to the fabric itself or to each reproduction thereof, but, instead, applied the copyright notice to a piece ticket and only one piece ticket per multi-repeat bolt of licensed fabric, and where, as here, the defendant in a subsequent action for infringement of the copyright did not rely on the insufficient notice when it undertook to copy the copyrighted design and was actually unaware of the insufficient notice until after the infringement action was instituted?

3. In the situation described in Question 2, is the copyright forfeited where, as here, the licensed fabric was never sold to the public or through sales channels selling fabric to the public, but was sold only to manufacturers of upholstered furniture for use in furniture manufacture, and where, as here,

a. there is no showing that the allegedly insufficient copyright notice was ever published or otherwise brought to the attention of the public, or that the public ever relied thereon or was misled or deceived thereby or was even aware thereof, and

b. there is no showing that the furniture manufacturers who purchased and used the licensed fabric, or any other furniture manufacturers, ever relied on, or were ever misled or deceived by the allegedly insufficient copyright notice?

4. In the situation described in Question 2, is the copyright forfeited in the absence of proof that the copyright owner was aware of or authorized the use of the allegedly insufficient copyright notice, especially where, as here, the infringer-licensee testified without contradiction that the allegedly insufficient copyright notice was adopted without notification of or authorization from the copyright owner?

5. In the situation described in Question 2, where knowledge by the copyright owner of the allegedly insufficient notice was denied by both the copyright owner and the infringer-licensee, was it error for the trial court to find that the copyright owner "was aware that notice of its copyright proprietorship did not appear on every repeat of the licensed fabric", where this finding was based on the fact that the copyright owner supplied the infringer-licensee with a rubber stamp embodying the copyright notice and, because of the nature of the licensed fabric (multi-colored woven Jacquard), the rubber stamp could not be used to print the notice legibly upon the fabric?

6. Did the trial court err in finding that:

"After taking the position at the preliminary injunction stage of these proceedings that this notice was in complete conformity with statutory requirements (a position rejected by this Court's decision of April 13, 1976) as well as the licensing agreement, plaintiff switched horses in midstream and attempted to show at trial that prior to the institution of this action it possessed no knowledge whatsoever of Belle's method of affixing the copyright notice to the fabric", where, on its motion for a preliminary injunction plaintiff did indeed take the position that its licensee's copyright notice was valid, and then, after the trial court held the notice to be invalid, plaintiff moved to renew the motion, reasserting its position that the notice was valid and also showing that the notice had been used by its licensee with plaintiff's knowledge or authorization,

and, then, after the trial court denied the renewal motion, plaintiff appealed to this Court of Appeals giving the following as one of the proposed issues to be raised on appeal:

"Where plaintiff applies a copyright notice to the selvedge of its fabric at each repeat of the copyrighted pattern, and where both plaintiff and its licensee categorically deny that plaintiff authorized its licensee to apply only one copyright notice by any means to a multi-repeat bolt of the licensed fabric, and where defendant has introduced no evidence to show that licensee's use of a single copyright notice on a piece ticket was authorized by plaintiff, was it reversible error for the District Court to deny plaintiff's motion for a preliminary injunction on the ground that such copyright notice may have been authorized by plaintiff?"

7. Where, as here, fabric embodying a copyrighted design is sold only by the bolt and only to manufacturers of upholstered furniture for use in furniture manufacture, and where each bolt has a single piece ticket attached thereto giving the order number, piece number, pattern number, color, yardage and finish, which information is required for claims and reorders, and where such piece ticket is on the bolt when received by the furniture manufacturer and is retained by him on the bolt as long as fabric remains in the bolt, with yardage corrections regularly made to reflect yardages removed from the bolt, is a copyright notice applied to the piece ticket necessarily insufficient because the bolt contains more than one repeat of the copyrighted design and there is only one piece ticket per bolt?

8. In an action under Section 43(a) of the Lanham Act, brought by the owner of the copyright on a fabric design against one who copied same without authorization, is it not a per se violation of Section 43(a) for the copyist to apply its own copyright notice to samples of the unauthorized copy, falsely naming itself as the copyright owner, and to use those samples for solicitation of orders?

9. In a situation such as is described in Question 8, does Section 43(a) require proof of injury to the copyright owner or is there a presumption of injury?

10. In a situation such as is described in Question 8, did the trial court err in dismissing the Section 43(a) action on the ground that there is no evidence of injury to the plaintiff copyright owner, where the parties stipulated in open court, at the start of trial, with the approval of the trial court, to defer the trial of all damage issues until after a determination of the liability issues?

11. In a situation such as is described in Question 8, did the trial court err in dismissing the Section 43(a) action where (a) testimony was introduced to show injury and such testimony was not refuted, (b) defendant admitted applying its own copyright notice to samples of its entire line of upholstery fabrics (consisting of 150-170 different designs in different materials and colors), and (c) defendant admitted it claims no copyright in any of said 150-170 fabric designs (except as the copyright notice itself constitutes such claim)?

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Giselle Montay, being duly sworn, deposes and says:

I am employed by Stoll and Stoll, attorneys for plaintiff in the above action. On August 25, 1976, I duly served the within *Pre-Argument Statement on* Kreindeler, Relkin & Goldberg, attorneys for defendant, by *mailing* a true copy thereof to them at their office at 500 Fifth Avenue, New York, New York,

Giselle Montay
Giselle Montay

Sworn to before me this
25th day of August, 1976.

Samuel J. Stoll
Notary Public

SAMUEL J. STOLL
NOTARY PUBLIC, State of New York
No. 31-3858725, New York County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
GREEFF FABRICS, INC., : Before:
:
Plaintiff, : HON. JOHN M. CANNELLA,
:
District Judge.
:
-against- :
:
MALDEN MILLS INDUSTRIES, INC., : 76 Civ. 1188
:
Defendant. :
:
-----:

New York, July 14, 15, 1976

STENOGRAPHER'S MINUTES

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
GREEFF FABRICS, INC.,

Plaintiff, :

-against- : 76 Civ. 1188 JMC

MALDEN MILLS INDUSTRIES, INC., :

Defendant. :

-----x
BEFORE:

HON. JOHN M. CANNELLA,

District Judge

New York, New York
July 13, 1976 10:00 a.m.

APPEARANCES:

STOLL & STOLL, ESQS.,
Attorneys for Plaintiff,
Empire State Building,
New York, New York 10001
BY: ROBERT S. STOLL, ESQ.,
SAMUEL J. STOLL, ESQ.,
Of Counsel.

KREINDLER, RELKIN & GOLDBERG, ESQS.,
Attorneys for Defendant,
500 Fifth Avenue,
New York, New York 10036
BY: GEORGE E. GOLDBERG, ESQ.,
Of Counsel.

ALSO PRESENT:

NORMAN N. POPPER, ESQ.,
Appearing for witness Jeremiah Lowkowitz

1 MR. ROBERT STOLL: I wish to hand up marked plead-
2 ings and a stipulation, subject to your Honor's approval,
3 with respect to confidentiality of sales figures and related
4 numbers.
5

6 If it please, the Court I am Robert Stoll, appearing
7 on behalf of the plaintiff, Greef Fabrics. This case has
8 been before your Honor on one or two occasions with respect
9 to preliminary matters. Therefore, my introductory statement
10 I think ought to be brief. I believe you have a basic
11 familiarity with this case.

12 There are two causes of action in the amended
13 complaint, one for copyright infringement and the second
14 for false marking under Section 43(a) of the Lanham Act.

15 The copyright infringement cause of action is
16 reasonably straightforward, so far as the plaintiff's
17 case is concerned. The second cause of action, for false
18 marking, is in connection with the defendant's use of
19 a copyright notice on its strike-off samples.

20 With respect to the copyrighted fabric design,
21 which the plaintiff calls "Contemplation", there have
22 been some stipulations in prior proceedings in this case
23 with respect to validity of the copyright, at least up to
24 a certain period of time stipulations with respect to
25 authorship, originality and what-have-you.

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I would ask Mr. Goldberq, counsel for Malden, whether at this time he would be willing to stipulate that the plaintiff, Greeff, is the author of an original work of art in the form of a fabric design known as "Contemplation."

MR. GOLDBERG: Your Honor, we are willing to stipulate that as of October 20, 1976, approximately, plaintiff Greeff Fabric was the proprietor of a copyright, a valid and subsisting copyright, of a design which constitutes the subject of the lawsuit.

As your Honor knows we claim they forfeited their copyright, but we are prepared to stipulate to the then validity of the copyright.

MR. ROBERT STOLL: Do I understand that your stipulation applies to all features of authorship, originality and title in the plaintiff?

MR. GOLDBERG: Whatever is required, yes.

MR. ROBERT STOLL: Would you also stipulate, sir, that the proceedings before the Copyright Office and the certificate of registration were all duly performed according to law and that a proper certificate dated --

MR. GOLDBERG: In that connection we have contacted the Copyright Office to determine what was deposited, and we have received a certification from the Copyright Office of the size of the deposit copies, which is of some

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2 significance in this lawsuit, so that I would certainly
3 stipulate as to what you have just stated, Mr. Stoll,
4 and would ask that include in that as a stipulation that
5 the deposit copies measured approximately 37-1/2 inches
6 in width and 55-1/2 inches in length.

7 MR. ROBERT STOLL: I believe that is a correct
8 figure, and at least one of the exhibits to be introduced
9 will indicate that, I believe.

10 MR. GOLDBERG: Very well.

11 THE COURT: Can you tell me how long this trial
12 is going to take? I have several more cases to
13 follow.

14 MR. ROBERT STOLL: I believe plaintiff's prima
15 facie case should be very brief indeed. In fact, many
16 of these stipulations, of course, are making out the
17 plaintiff's prima facie case. We will ask that certain
18 exhibits --

19 THE COURT: I didn't ask for your reasoning.
20 What is the bottom line; a day, a half a day?

21 MR. ROBERT STOLL: Our prima facie case
22 will be completed in half an hour, perhaps less.

23 THE COURT: How about you?

24 MR. GOLDBERG: I would very much hope that we will
25 be finished today.

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2 THE COURT: All right. I wanted to notify the
3 other lawyers in the other cases which are waiting.

4 MR. ROBERT STOLL: We would like an opportunity
5 for a short rebuttal once the defendant's case is put in.

6 THE COURT: All right.

7 MR. ROBERT STOLL: A major stipulation that we
8 have is with respect to damages and I believe counsel have
9 agreed between them, and we request your approval, that
10 the issue of damages be postponed pending a determination
11 of the merits of this action.

12 THE COURT: All right. We will try the liability
13 first.

14 MR. GOLDBERG: Thank you, your Honor.

15 MR. ROBERT STOLL: Very good, sir.

16 With respect to --

17 MR. GOLDBERG: Forgive me the interruption, Mr.
18 Stoll. In connection with the stipulation as to damages,
19 which we believe is customary in copyright cases, there
20 is one additional factor in this case, and that is in the
21 second cause of action, under the Lanham Act, the
22 plaintiff could only have standing if the plaintiff had
23 damages. In that connection we believe the issues of damages,
24 limited to the question of copyright symbols on the strike-
25 offs, would have to be part of the copyright suit.

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2 MR. ROBERT STOLL: We shall endeavor to make
3 a showing of damages preliminarily just to satisfy
4 that point, your Honor.

5 MR. GOLDBERG: Thank you.

6 MR. ROBERT STOLL: On that point, your Honor, I
7 request another stipulation of counsel with respect to the
8 second cause of action, and that is that the defendant,
9 Malden, has presently in its line between 150 and 175
10 fabric designs, strike-offs of all such patterns. They
11 are the "C" in the circular symbol on the reverse,
12 but that except for such symbol the plaintiff makes no
13 claim in copyright for any of those patterns.

14 MR. GOLDBERG: Mr. Stoll, you left out a step.
15 As of March 19, 1976, the date of the hearing motions in
16 this court for a preliminary injunction, the plaintiff had
17 in its upholstery line some 175 designs. On those strike-offs
18 there appeared a copyright symbol, although Malden didn't
19 claim copyright.

20 Immediately following that hearing Malden
21 immediately took steps to see that that copyright symbol
22 was removed from all strike-offs, and it has been removed,
23 and today no copyright symbol appears on any design on
24 which Malden doesn't claim copyright.

25 MR. ROBERT STOLL: Is it correct, Mr. Goldberg,

that Malden doesn't claim copyright in any of those designs?

MR. GOLDBERG: Yes.

MR. ROBERT STOLL: If it please the Court, unless your Honor would like a slightly more expanded opening statement, I do believe you are familiar with the basic issues in the case.

THE COURT: Well, I don't think you and your father feel that I am as familiar with it as you would like me to be familiar with it, but I think I am. I think I know what the points are, and I have gotten a little more education since I last heard this case, because I tried another case which involved some of the points in this case, namely, Joplin Music, the entertainer and singer. Some of the issues in that case are similar to this, so I have gotten a lot more education.

With that, then, you may make your opening statement.

MR. GOLDBERG: I thought that was your prima facie case.

THE COURT: Well, it was a combination of both, but do you want to make an opening statement?

MR. GOLDBERG: If your Honor please, yes, sir. We were prepared to go forward to show when they forfeited their copyright and how they did it. It is the defendant's

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2 position that on October 20th or approximately October
3 20, 1975, plaintiff forfeited its copyright when it licensed
4 one Belle Fabrics, Inc. to publish copies of the subject
5 design with inadequate copyright notice.

6 Now, the license agreement itself provided for
7 the form of copyright notice that was to be used, and the
8 plaintiff provided a rubber stamp to use. The rubber stamp
9 could only be applied to the hang tag which Belle used
10 it on its other fabrics. It was physically impossible
11 to apply it to the fabrics, and the plaintiff knew then
12 or shortly thereafter that the only place that the notice
13 could be put was on the tag. So the use of the notice on the
14 tag was fully authorized.

15 In fact, we will show through the testimony of
16 Belle's attorney, who is here, and through the testimony
17 of Belle's president that there is no question but that
18 Belle fully complied with the notice requirements imposed
19 by the plaintiff when Belle published its fabric with
20 notices which this court has already decided were
21 inadequate to protect the plaintiff's copyright.

22 It is our understanding that the only issues
23 today are whether these inadequately noticed publications
24 were authorized by the plaintiff, since that is my under-
25 standing of this court's decision of April 13, 1976,

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2 which was then affirmed when the court denied a motion for
3 reargument on that decision.

4 We are prepared to go ahead.

5 THE COURT: All right. Then suppose you put
6 in the rest of your case.

7 MR. GOLDBERG: Your Honor, for our first --

8 MR. ROBERT STOLL: Excuse me. I didn't rest our
9 case. We have not put in our exhibits.

10 THE COURT: No. I am saying you go ahead with
11 your case.

12 Do you have some argument to add?

13 MR. GOLDBERG: Yes, just one thing, your Honor.
14 We have subpoenaed the attorney for Belle Fabrics, Norman
15 Popper, who is a distinguished New Jersey attorney, who
16 has just risen.

17 Mr. Popper has appearances this noon before Judge
18 Owen.

19 MR. POPPER: Correction. My appearance before
20 Judge Robert Owen has been continued until a date early
21 in August, so I am at liberty to attend, and I have
22 been asked by a witness, Mr. Jeremiah Lewkowicz, to repre-
23 sent him, and I am here in that capacity, and I ask
24 your Honor's leave to represent the witness, and I don't
25 represent any party to the case. May I have such privilege?

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2 THE COURT: Are you admitted to the Bar of this
3 court?

4 MR. POPPER: I am admitted to the Bar of this
5 court since 1937.

6 THE COURT: Fine. Anybody can represent a
7 witness at any time.

8 MR. GOLDBERG: Your Honor, the only thing is that
9 we would make the usual request for exclusion of witnesses
10 except for one representative on each side designated
11 by counsel.

12 THE COURT: That is a usual request, and it is
13 granted. Each lawyer will tell the people that are
14 affected to wait in the witness room until they are
15 going to be used.

16 MR. GOLDBERG: Your Honor, I believe that both
17 Mr. Popper and Mr. Lewkowicz are going to be witnesses,
18 who would come under the exclusion order. I don't know what
19 to do about Mr. Popper, who is counsel for a witness. Until
20 his witness is called --

21 MR. ROBERT STOLL: I would ask Mr. Popper be
22 allowed to remain.

23 MR. POPPER: I represent to the Court, your
24 Honor, that I shall not advise my client about this
25 testifying --

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2 THE COURT: What is the point with your client?

3 MR. POPPER: He has certain trade secrets, and
4 he wants confidentiality with respect to those.

5 THE COURT: What about that?

6 MR. GOLDBERG: We certainly don't object to
7 Mr. Popper representing Mr. Lewkowicz.

8 THE COURT: No, about keeping some of this
9 confidential.

10 MR. GOLDBERG: We are going to keep all of it
11 confidential.

12 THE COURT: Then we will have no problem as to
13 that. I think the question of notice is very important,
14 and you might be affected subliminally, like the boy who is
15 asked to go into the corner and not think of a white
16 elephant. What is the first thing he thinks of when he
17 gets into the corner? He thinks of a big, white
18 elephant.

19 I think out of an abundance of caution you should
20 be requested not to be present in the court until your
21 client is called. There is no reflection upon you at all.
22 It is just that subliminally you might be affected.

23 (Pause.)

24 MR. ROBERT STOLL: I am informed that the two
25 individuals sitting on the front bench aren't connected

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2 with this case but are admirers of the Judge.

3 THE COURT: No. They are friends of mine by
4 virtue of coming to court and seeing me from time to time.
5 I don't know if I amuse them or what it is, but they
6 are very loyal.

7 MR. GOLDBERG: Your Honor, while we are waiting,
8 might I introduce my colleagues at the counsel table.
9 To my left is Thomas B. Kinzler, who was recently admitted
10 to the Bar of this court by Judge Ward, and to his left
11 is Mr. Kenneth J. Schulman, a member of the St. John's
12 Law Review, who is clerking in our court this summer.

13 THE COURT: Glad to see you, gentlemen.

14 MR. ROBERT STOLL: Counsel has indicated in his
15 statement that your Honor has made a determination with
16 respect to the adequacies of certain use of the copyright
17 notice. I do believe there may be additional evidence
18 on that point, and I am certain that your Honor hasn't
19 prejudged that issue.

20 THE COURT: No, nor have I foreclosed it.

21 MR. ROBERT STOLL: Very good, sir. I would like
22 to introduce at this time some exhibits, again with the
23 assistance of Mr. Goldberg by way of stipulation:

24 As Plaintiff's Exhibit 1 a copy of the certificate
25 of registration of the claim to copyright of the pattern in

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2 question.

3 MR. GOLDBERG: No objection.

4 MR. ROBERT STOLL: This is Registration No. GP93648
5 issued to Greeff, the plaintiff in this case, for its
6 "Contemplation" fabric design, known officially and
7 identified in the certificate as "58710-13, Contemplation."

8 (Plaintiff's Exhibit 1 received in
9 evidence.)

10 MR. ROBERT STOLL: I ask as Plaintiff's Exhibit
11 2 that there be received a certified copy, certified by
12 the Copyright Office, a specimen which was submitted in
13 support of the copyright. I believe that the certificate
14 itself contains the dimensions of the cloth that was
15 deposited, as Mr. Goldberg has indicated.

16 MR. GOLDBERG: I believe under Rule 803(a) of the
17 Rules of Evidence this exhibit is admissible. We
18 certainly have no objection.

19 (Plaintiff's Exhibit 2 received in
20 evidence.)

21 MR. ROBERT STOLL: I ask that there be introduced
22 into evidence as Plaintiff's Exhibit 3 a specimen of
23 the plaintiff's copyright fabric. We have two specimens
24 here. I ask that the first, the larger specimen be
25 entered as Exhibit 3-A and the smaller specimen be entered

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2 as Exhibit 3-B. The smaller specimen was the one that
3 was marked as Petitioner's Exhibit 1 at the hearing
4 on the preliminary injunction in this case.

5 MR. GOLDBERG: Mr. Stoll, I notice on the selvage
6 of the larger piece, which has been offered as Plaintiff's
7 Exhibit 3-A, that it say "Printed in England for Warner
8 & Sons, Ltd."

9 Could you tell the Court what that has to do
10 with the plaintiff, if anything?

11 MR. ROBERT STOLL: I believe that that question
12 has arisen in the discovery. Warner & Sons, Ltd. is an
13 affiliate of the plaintiff, Greeff, but the copyright
14 clearly reads in the plaintiff's name alone.

15 MR. GOLDBERG: We have no objection.

16 (Plaintiff's Exhibit 3-A and 3-B received
17 in evidence.)

18 MR. ROBERT STOLL: I ask that there be admitted
19 as Plaintiff's Exhibit 4 a specimen of the accused fabric,
20 this being the same specimen identified as Petitioner's
21 Exhibit 2 at the hearing on a preliminary injunction in
22 this case.

23 MR. GOLDBERG: No objection.

24 MR. ROBERT STOLL: I would state that Exhibit 3-B,
25 the smaller specimen of plaintiff's fabric, has been

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2 folded and stapled so as to show the section of the
3 pattern represented by Exhibit 4, the accused pattern.

4 (Plaintiff's Exhibit 4 was received in
5 evidence.)

6 MR. GOLDBERG: Your Honor, with respect to the
7 exhibit that Mr. Stoll has just put in to show the
8 likenesses the defendant is again prepared to stipulate
9 that the accused fabric, Plaintiff's Exhibit 4, was made
10 by the defendant by copying from a copy of the plaintiff's
11 fabric.

12 MR. ROBERT STOLL: Thank you, Mr. Goldberg.

13 I would indicate to your Honor that the defendant
14 has in fact clearly admitted in the pleadings infringement
15 of the copyright, and I refer in particular to paragraph
16 4 of the answer to the amended complaint, which states
17 that after certain denial, defendant admits that
18 defendant has produced, marketed and sold fabric embodying
19 the design annexed to the amended complaint as Exhibit 2
20 "or a facsimile thereof," and Exhibit 2 is the plaintiff's
21 copyrighted design.

22 So there is a direct admission of infringement,
23 and I believe the case is closed insofar as that is concerned.

24 I might suggest and recall for your Honor that
25 you made a tentative finding along those lines at the

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hearing on the preliminary injunction.

MR. GOLDBERG: There is, of course, no admission of infringement. There is an admission of copying of an item in the public domain which was free to be copied. Infringement is a conclusion of law which we certainly admit.

MR. ROBERT STOLL: In a notice to produce directed by the plaintiff to the defendant, there was a request for specimens of all of the defendant's strike-offs. One sample of each of the defendant's patterns in its line as of the date of the commencement of this action, and in response to that notice, certain specimens were produced by the defendant. There is a short colloquy, which I would like to read into the record, which appears in the Levine deposition, page 43, statement by Mr. Stoll.

"MR. GOLDBERG: Item 10 of the notice to produce calls for one sample of each of defendant's patterns in defendant's sales line as of the date of the commencement of this action and any additional patterns since then, wherein the same has the legend 'Malden' and a 'C' in the circle appeared thereto, and the defendant doesn't otherwise claim any copyright therein. I ask you what you have here to produce in response to that question."

"MR. GOLDBERG: First of all, as the witness

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2 has stated there are no samples of a Malden fabric
3 in which there is a 'Malden' with a 'C' in the circle
4 and no claim to copyright. However, we don't want to be
5 too technical. We assumed that you meant strike-offs,
6 not samples, and we have brought a representative number
7 of strike-offs. In fact, as I told you, we have ten
8 strike-offs with us, in which the legend 'Malden', 'C'
9 in the circle appears, and Malden has no claim to copy-
10 right in those designs."

11 That is an end of the quote.

12 I read this in not to opt Mr. Goldberg's state-
13 ment, certainly, but by way of identification of the
14 next exhibit, which I wish to introduce, namely, the ten
15 strike-offs provided by the defendant. These have been
16 marked at Mr. Levine's deposition as Plaintiff's Exhibits
17 2 through 11 inclusive. I ask that they be introduced
18 into evidence here as Plaintiff's Exhibit 5 collectively.
19 We can identify them by A, B and C in the same order
20 number as identified at the deposition.

21 MR. GOLDBERG: Your Honor, I am surprised to
22 see Mr. Stoll offering these, because I can't imagine what
23 issue that would be in his favor could possibly be helped
24 by these strike-offs.

25 Certainly, the plaintiff, I assume, is not --

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2 THE COURT: Just back up a little bit. You
3 have no objection, or do you have an objection? If they
4 are going to help you, I don't know why you are objecting.
5 If they aren't going to help you --

6 MR. GOLDBERG: Thank you, your Honor, no objection.

7 THE COURT: All right, if there is no objection
8 they are going to be received.

9 MR. ROBERT STOLL: Thank you, your Honor.

10 (Plaintiff's Exhibit 5-A to AJ inclusive
11 received in evidence.)

12 MR. ROBERT STOLL: I would like to call as
13 plaintiff's first witness Mr. Sanford Levine.

14 MR. GOLDBERG: Your Honor, I suppose that -- it
15 would seem to me that this is an attempt on the part of
16 the plaintiff -- Sanford Levine is the defendant's
17 sales manager. It would appear to me that this is an
18 attempt on the part of the plaintiff to reverse the
19 order of proof and make me in effect cross examine
20 my own witness.

21 MR. ROBERT STOLL: The sole reason for calling
22 him is to identify two specimens of fabric.

23 THE COURT: Show them to him and maybe it can
24 be conceded without calling Mr. Levine.

25 MR. GOLDBERG: I am in a position to identify

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2 these.

3 THE COURT: All right. There being no objection,
4 they are received as Exhibits 6 and 7.

5 MR. ROBERT: Stoll to identify them, the one
6 that has the "Malden" and "C" in the circle on the back
7 will be Plaintiff's Exhibit 6.

8 (Plaintiff's Exhibit 6 received in
9 evidence.)

10 MR. ROBERT STOLL: And the specimen which is
11 identified as pattern I554 and has no printing on the
12 back, will be Plaintiff's Exhibit 7.

13 (Plaintiff's Exhibit 7 received in
14 evidence.)

15 MR. ROBERT STOLL. I then call Mr. Richard Johann.

16 R I C H A R D C. J O H A N N, called
17 as a witness by the plaintiff, being first duly
18 sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. STOLL:

21 Q Mr. Johann, will you please state your present
22 position?

23 A I am president and chief operating officer of
24 Greeff Febrics, Inc.

25 Q Greeff being the plaintiff in this action?

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2 A Yes, sir.

3 Q Mr. Johann, once again to go over this rather
4 quickly -- it has been explored rather thoroughly in
5 deposition -- will you please describe for the Court the
6 nature of the plaintiff Greeff Fabrics so far as its
7 business is concerned?

8 A We are known in the interior design trade as
9 a wholesaler of fine fabrics to interior designers and
10 related trades people.

11 Q Very briefly, how does the plaintiff Greeff
12 sell its fabrics?

13 A Well, they are originally designed and manufactured
14 by a third party, warehoused in the Portchester facility,
15 and our direct sales team sells to interior designers
16 and related trades people via swatches.

17 Q I hand you Plaintiff's Exhibit 3-A, which
18 has been introduced into evidence as a product of the
19 plaintiff and ask you if you are familiar with it and
20 can identify it.

21 A I am familiar with it and can identify it as our
22 fabric, "Contemplation" pattern 58170.

23 Q This is the pattern in issue in this case?

24 A Yes, it is.

25 Q Mr. Goldberg has referred to a statement in

1 mprf Johann-direct 21
2 the selvage which indicates "Printed in England for
3 Warner & Sons, Ltd." And I ask you to please indicate
4 to the Court the connection, if any, between plaintiff
5 and Warner & Sons, Ltd.?

6 MR. GOLDBERG: Objection. It has already been
7 stipulated.

8 THE COURT: It is stipulated as a fact, and
9 there is no need to go into that.

10 Q May I just ask for confirmation from the
11 witness. Is it an affiliate?

12 THE COURT: It seems to be surplusage. The lily
13 having arisen, there is no need for you to paint it or gild
14 it.

15 Q Mr. Johann, is the "Contemplation" pattern a
16 successful pattern with Greeff?

17 A Yes, sir.

18 Q And it has been successful since its introduction
19 to the present day?

20 A It has.

21 Q It is still currently in the Greeff line, isn't
22 it?

23 A It is.

24 Q Would you describe basically the types of customers
25 which Greeff would have for their fabric and fabric design?

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2 A Well, its primary use would probably be an
3 interior designer, but that wouldn't preclude an upholsterer
4 or a drapery workroom or an architect or a furniture
5 manufacturer or specifying designer or any of the same
6 to specify it.

7 Q And, indeed, isn't it sold to upholstery manu-
8 facturers?

9 A It is.

10 Q And is it not sold to interior designers?

11 A It is.

12 Q Does Greeff sell through its own showrooms?

13 A Yes, we do.

14 Q Where are those showrooms?

15 A Domestically in Boston, Massachusetts, Portchester,
16 New York, New York City, Georgetown, Washington, D.C.,
17 Chicago, Illinois, San Francisco and Los Angeles, California.

18 Q Those were domestic showrooms?

19 A They are.

20 Q Would you please identify any other showrooms
21 which Greeff may have?

22 A We have also showrooms in Toronto, Canada;
23 London, England; Milan, Italy; and Paris, France.

24 Q I hand you a document and ask you if you can
25 identify it.

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THE COURT: Mark it, first.

MR. GOLDBERG: I have no objection to it being received.

(Plaintiff's Exhibit 8 marked for identification.)

Q Mr. Johann, would you please describe Plaintiff's Exhibit 8 for identification?

MR. GOLDBERG: Objection. It is there. It speaks for itself.

THE COURT: It does. Are you offering it?

MR. ROBERT STOLL: I do wish to offer it.

THE COURT: Any objection?

MR. GOLDBERG: No, your Honor.

(Plaintiff's Exhibit 8 for identification received in evidence.)

Q Mr. Johann, I hand you Exhibit 8 and ask you whether the design in question in this lawsuit is indicated in the exhibit, which is Greeff's catalog?

MR. GOLDBERG: Objection, your Honor.

THE COURT: It speaks for itself. I can look at it.

MR. GOLDBERG: Your Honor, we also object, because the catalogs state Spring 1975, which could have nothing to do with this lawsuit, since it is the defendant's

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2 claim that the plaintiff forfeited its copyright in
3 October of 1975.

4 MR. ROBERT STOLL: For the record I would like
5 to state that the exhibit contains an insert which is
6 a supplement to the catalog.

7 THE COURT: I will take it subject to connection.
8 If it is not connected I will disregard it.

9 MR. GOLDBERG: Thank you.

10 Q Mr. Johann, would you please describe to the
11 Court the history of the plaintiff, briefly, the history
12 of Greeff?

13 MR. GOLDBERG: Objection, your Honor, I don't
14 think it has anything to do with the lawsuit.

15 MR. ROBERT STOLL: If it pleases the Court, I
16 am leading up to reputation testimony and on the issue
17 of damages.

18 MR. GOLDBERG: We aren't trying damages today.

19 THE COURT: Well, rather than have him come back
20 on the question of damages --

21 MR. GOLDBERG: Well, he will have to come back
22 on the question of damages, because every question I
23 asked him was on breakdown of damages, and if the
24 Court should find liability --

25 MR. ROBERT STOLL: I indicated I would provide

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2 a thresh hold basis for damages.

3 THE COURT: For that purpose I will take it.

4 Q Would you please describe, Mr. Johann, the
5 history of Greeff, briefly?6 A It was founded a year after I was born, in
7 January of 1933, by Mr. Theodore Greeff, and we had,
8 I am told, rather difficult times in establishing the
9 company. There were a lot of financial ups and downs,
10 and we gradually established ourselves through our
11 design ability as one of the. at least in my opinion,
12 one of the leading design houses in the country.13 We are a small company -- we aren't large in
14 terms of the other company at issue here -- but we have
15 always prided ourselves on the character of our company
16 and our reputation does mean a great deal, or the so-
17 called image.18 We gradually established ourselves in offices,
19 built a facility in Portchester and have now expanded
20 it, and I am told now in our classification in the industry
21 we are number two.

22 Q Does Greeff have its own design studio?

23 A We do.

24 Q To your knowledge, is the design in question, the
25 "Contemplation" design, a product of the Greeff design

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2 studio?

3 A Yes, I believe it is.

4 Q Are you familiar, Mr. Johann, with the reputation
5 of Greeff in the industry insofar as its fabric designs
6 are concerned and its products?

7 MR. GOLDBERG: I am sorry, I can't hear, Mr. Stoll.

8 MR. ROBERT STOLL: I asked him if he was familiar
9 in the industry with the reputation of Greeff insofar
10 as its products and designs are concerned.

11 MR. GOLDBERG: I thought he had answered that.

12 THE COURT: That's right. He said he was number
13 two. He was Avis to Hertz.

14 MR. ROBERT STOLL: I was trying to bring him up
15 to number one.

16 THE COURT: I know, but he said number two. They
17 are still trying, as Avis says.

18 Q Does Greeff have a reputation in the industry
19 for original fabric designs?

20 MR. GOLDBERG: That is leading.

21 THE COURT: It is leading, and I instruct the
22 jury to disregard it.

23 MR. GOLDBERG: Thank you, your Honor.

24 Q Are you familiar with the reputation of the
25 plaintiff in connection with its fabric design?

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MR. GOLDBERG: Again --

MR. ROBERT STOLL: Just leading into the same question.

THE COURT: Well, it seems to me, that he's indicated it is a good company and they are number two. We may have to go into this too at another time.

THE COURT: If it pleases the Court --

THE COURT: Wait a minute. Just answer the questions. Don't volunteer anything. That is what you pay a lawyer for.

Q Does Greeff regularly protect its original patterns and fabric designs through copyright means?

A We do.

Q Is Greeff's business based largely on such copyright patterns?

A We do.

O You are familiar, are you not, with the accused fabric, Plaintiff's Exhibit 4?

A I have seen it. I am not totally familiar with it, but I have seen it.

Q Will you please describe for the Court the impact which the presence of this fabric has had on Greeff?

MR. GOLDBERG: That is a very general question.

THE COURT: It is a fact question, whereas it

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2 should be an opinion question.

3 MR. ROBERT STOLL: He is not here as an expert.

4 THE COURT: That is the way the question is posed.

5 If you add "what in your opinion" --

6 MR. ROBERT STOLL: All right.

7 Q What, in your opinion, is the impact of this
8 accused fabric on the market on the plaintiff Greeff?

9 A I think it is that effect on our reputation --

10 MR. GOLDBERG: Your Honor, that obviously goes
11 to damages with respect to the copyright infringement.
12 Mr. Stoll didn't limit that question as to the question
13 whether the copyright symbol on the strike-off caused the
14 damage. I thought that was mainly for what we were going
15 to take Mr. Johann's testimony now.16 THE COURT: I think this is so. I think we
17 will get into all of this if we get a recovery in this
18 case. We will have to go into this in detail later on.19 It seems to me you have established sufficient
20 for the purpose of legally allowing damages in this case.21 MR. STOLL: Would that be so with respect to the
22 second cause of action?

23 THE COURT: I think so.

24 MR. ROBERT STOLL: Thank you, sir.

25 THE COURT: If Mr. Goldberg wants to develop

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2 anything on cross examination to indicate, otherwise I will
3 be glad to listen.

4 MR. GOLDBERG: Our only position on the second
5 cause of action, your Honor, would be that plaintiff has
6 already stated that it wasn't in any way damaged by the
7 use of the copyright symbol on the strike-offs.

8 THE COURT: You mean by way of examination during
9 deposition?

10 MR. GOLDBERG: Yes, sir.

11 THE COURT: Well, I haven't heard a thing on
12 that.

13 MR. GOLDBERG: We aren't going to go beyond
14 that. That is all right.

15 MR. ROBERT STOLL: One last question, I believe,
16 then.

17 Q Has the use of a copyright notice, symbol "C" in
18 the circle, on the defendant's copy of Greeff's design,
19 had any affect upon the reputation of Greeff?

20 THE COURT: Well, it would seem to me you would
21 have to lay a foundation before you could ask that
22 question, because in order for him to answer that question
23 it would seem to me he would have to know how many people
24 saw this with the strike-off on it and under what circum-
25 stances did they see it and was it reported back to him.

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2 Now, unless you lay a foundation for that,
3 his testimony is pure conjecture, as he puts it.

4 I can imagine it might have had some effect. I can
5 imagine anything, but the question is, has he a sufficient
6 basis for that on which to form an opinion?

7 (To the witness.)

8 Did you know anybody that saw this strike-off
9 on the back of this material?

10 THE WITNESS: Yes, I do.

11 THE COURT: Who?

12 THE WITNESS: Some customers in North Carolina.

13 THE COURT: Who are they?

14 THE WITNESS: Vanquard Furniture was one.

15 MR. GOLDBERG: Your Honor, I object. Mr. Johann
16 on his deposition refused to give any names of customers
17 whatsoever. That gives us no opportunity to check with
18 the customers to verify --

19 THE COURT: Well, that would be surprise. I will
20 allow him to answer. However, I will keep in mind he
21 refused to answer in deposition if in fact that is the
22 case. I don't know if it is, because I haven't heard
23 anything about the deposition yet.

24 Further, I will allow you to bring these people
25 in at an adjourned date. That could be done by phone, and

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2 if you want to bring them up I can hear them next week
3 or whatever time you want.

4 MR. GOLDBERG: All right. I will save it for
5 cross examination.

6 Q You named a customer, I believe?

7 A Yes. Vanguard Furniture.

8 Q Would you be good enough to name another one
9 if it fits into the category that the Judge has named?

10 A I can't recall the second. I do believe I have
11 some notes in the office that might --

12 Q All right. Then with respect to Vanguard, what
13 have they indicated to you with respect to this suit
14 about the Malden Strike-off with the symbol "C" in the
15 circle, which is Exhibit 4?

16 A Mr. Nachlen informed me that he had seen this
17 and that he was disappointed and kind of shocked that we
18 would be knocked off in this fashion. I believe he called
19 it a Chinese copy

20 MR. GOLDBERG: Objection, your Honor. That is
21 not responsive. We are talking about the copyright symbol
22 on the back of the strike-off, as I understood the question.

23 THE WITNESS: I understand it. No, there
24 was no reference made to the copyright symbol. He
25 was talking about the design.

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Johann-direct

2 MR. ROBERT STOLL: Then I withdraw that line of
3 questions, your Honor.

4 THE COURT: All right.

5 MR. ROBERT STOLL: Your Honor, I believe it is
6 within the competency of this witness to state the
7 impact upon Greeff, to his own knowledge.

8 THE COURT: Yes, but what is his knowledge?
9 That is the point. Unless you lay a foundation which
10 shows that people have seen this and reported to him
11 and it affected his sales, it would seem to me everything
12 else is speculation on his part, and I don't think
13 it would be allowable.

14 If you lay a foundation, fine and good.

15 This fellow in North Carolina said, "Look, I
16 saw a strike-off of this and it is terrible material.
17 It is affecting our business here. People think they are
18 getting Greeff and they are getting something else"--
19 you can argue it from the facts that have been developed
20 so far, but that would be legal argument. It wouldn't
21 be factual argument.

22 MR. ROBERT STOLL: We have additional testimony
23 on the issue and I would not press it further at this
24 point.

25 That is all, your Honor, for this witness.

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Johann-cross

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2 CROSS EXAMINATION

3 BY MR. GOLDBERG:

4 Q Mr. Johann, so there won't be any question about
5 it, has any customer of Greeff come to you and told you
6 or in any way suggested to you that your copyright on
7 "Contemplation" wasn't authentic because they had seen a
8 copyright notice on a Malden fabric?

9 A Not to my knowledge.

10 Q Do you know who Belle Fabrics is, sir, B-e-l-l-e?

11 A I do now.

12 MR. ROBERT STOLL: Objection. This was not done
13 into on direct.

14 THE COURT: That's right, but if you read the
15 new rules it provides me with discretion, rather than
16 have the witness come back again or be recalled, to have
17 him testify on new matters, and since any lawyer can impeach
18 even his own witness it seems to me it is better to have
19 him here at one time rather than have him recalled and
20 have him back here again.

21 MR. ROBERT STOLL: Very good, your Honor.

22 Q Mr. Johann, I show you a document --

23 THE COURT: Mark it.

24 (Defendant's Exhibit A marked for
25 identification.)

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2 Q (Continuing) -- which contains the word
3 "judgment," and I ask you, Mr. Johann, if you can identify
4 it.

5 MR. ROBERT STOLL: I would like to see it.

6 A If I can identify the word judgment?

7 Q No, sir, can you tell the Court what the document
8 is, and is that your signature on the last page?

9 A It has no signature on the last page.

10 Q I'm sorry.

11 Forgive me, sir. The next to the last page.

12 A That is my signature.

13 Q Do you recall signing this document, sir?

14 Do you know what this document is, Mr. Johann?

15 A I don't know what the document is. I can't
16 recall what it is, but that is my signature, and obviously
17 I signed it.

18 THE COURT: You see, you must be very particular
19 in this court when you answer a question.

20 Let me see that a minute.

21 It is not your signature at all. It is a
22 photostatic copy of your signature. That is not your
23 original signature on here, is it?

24 THE WITNESS: No.

25 THE COURT: All right. Now, keep your wits
about you, because you are here protecting your interests,

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2 and if you answer a question make sure you know what you are
3 talking about. It is a photostatic copy of a signature
4 you made at some time.

5 Q Do you recall, Mr. Johann, a dispute that Greeff
6 had with Belle Fabrics? Let me even be more specific:
7 With respect to the "Contemplation" design.

8 A I do.

9 Q Do you recall that Greeff settled that dispute
10 with Belle Fabrics on or about October 29, 1975?

11 MR. ROBERT STOLL: Objection, your Honor.

12 This witness may or may not recall --

13 THE COURT: Well, let him say so. Maybe he can
14 refresh his recollection.

15 (To the witness.)

16 Do you remember the date?

17 THE WITNESS: I don't remember the date.

18 Q Do you recall, Mr. Johann, that you signed the
19 judgment in connection with the settlement of that dispute
20 with Belle?

21 MR. ROBERT STOLL: He has already testified
22 he doesn't recall this document.

23 THE COURT: Well, all he saw was the second
24 page. Let him look at it and see if it refreshes his
25 recollection.

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2 MR. ROBERT STOLL: The document does speak for
3 itself.

4 THE COURT: Well, at this point he is not offering
5 the document. He has a number of reasons for asking a
6 question like this. Number one, he could try and test
7 his recollection of past events, on a question of
8 credibility, and there are a number of reasons why he
9 could do that. So that is not significant at this point.
10 I don't find that to be a valid objection to the form of
11 the question.

12 THE WITNESS: I do know what it is. I did sign
13 it. That is a photostatic copy of my signature.

14 Q You say you do know what it is, Mr. Johann.
15 What is it?

16 A That is the settlement between Greeff and --

17 MR. ROBERT STOLL: The document does speak for
18 itself.

19 THE COURT: I will allow it.

20 Overruled. This also goes into his intent.
21 There are a number of other reasons. I don't want to go
22 into a catalog of them or a litany of them, but there are
23 allowable reasons for it to be posed in this fashion.

24 I overrule the objection, if it is an objection.

25 Q Go ahead, please.

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2 A -- and Belle Fabrics.

3 MR. GOLDBERG: We offer it in evidence.

4 MR. ROBERT STOLL: I object, your Honor, that
5 is only a portion of the settlement and I object to it.6 THE COURT: I will allow you to put in any
7 other documents that you feel should be a part of it, but
8 insofar as it is offered I will allow it.9 (Defendant's Exhibit A for identification
10 received in evidence.)11 Q Mr. Johann, did you play any direct role in
12 negotiating the settlement with Belle, by which I mean did
13 you have any contact with Belle's lawyer, Belle's president
14 or any other representative of Belle in that connection?

15 A I didn't.

16 Q Have you ever, to your knowledge, spoken with
17 any representative of Belle to this date?18 A I said "Good morning," to a gentleman this
19 morning. That is the first time.

20 Q The first time.

21 Did you play any role of any sort, in determining
22 the copyright notice that Belle Fabrics would use in
23 selling fabric with the "Contemplation" design?

24 A What do you mean by, did I play any role in it?

25 Q Did you prescribe the notice they would use?

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Johann-cross

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A No, I didn't.

Q You testified before, Mr. Johann, that in Greeff Fabrics you copyright many of your designs. Is that correct, sir?

A I said a substantial number of them, yes.

Q And when you copyright them, what form does the copyright notice take?

A What do you mean by "what form"?

Q Well, is it on the selvage of the fabric at every repeat of the design?

A Yes.

Q Mr. Johann, do you know the form of the copyright notice that Greeff Fabrics told Belle to use whenever it sold or delivered or advertised or promoted fabric using "Contemplation"?

A Do I personally know?

Q Yes, sir.

A I don't.

Q Sir, do you recall, on or about May 5th -- I think it is May 5, 1976 -- it is hard to read -- making an affidavit in which you stated, "Greeff has never authorized the use of a hang tag or piece ticket copyright notice by Belle or a single notice per bolt."

Do you recall making that statement?

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Johann-cross

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2 A I don't.

3 MR. ROBERT STOLL: Are you going to hand that
4 ot the witness?

5 MR. GOLDBERG: I am going to hand this to the
6 witness. This is a very poor copy. I wonder if you would
7 have a better copy of this.

8 THE COURT: Is there an affidavit in the
9 file here?

10 MR. GOLDBERG: There must be, your Honor.
11 I think the witness can probably read this, but if he
12 has trouble --

13 THE COURT: All right.

14 MR. ROBERT STOLL: May I see that?

15 MR. GOLDBERG: Your Honor, I am not quite sure
16 what is happening.

17 THE COURT: He wants to make sure it is legible.
18 He is showing it to his associate.

19 MR. GOLDBERG: I haven't offered it yet.

20 MR. ROBERT STOLL: I would like to see any
21 proposed exhibits before they are handed to the witness.

22 THE COURT: Well, I don't know that you are entitled
23 to that, under the circumstances. On the other hand, I don't
24 see any harm in this. There is nothing secret in
25 these proceedings, except some business things that have

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2 to be protected in which both of you join, so except
3 for that, I see nothing secret.

4 Q Mr. Johann, I ask you to read this affidavit
5 with particular attention to paragraph one.

6 (Defendant's Exhibit B marked for
7 identification.)

8 Q I ask you to read the affidavit, Mr. Johann,
9 that has been marked Defendant's Exhibit B for
10 identification, with particular attention to paragraph
11 one, and ask you if it is your signature on the last
12 page and if you recall making that affidavit.

13 THE COURT: There are two questions. Number one,
14 is that your signature on there.

15 MR. GOLDBERG: Rather, a photocopy of your
16 signature.

17 THE WITNESS: That is a photocopy of my signature.

18 THE COURT: Do you recall paragraph one?

19 THE WITNESS: I do recall it, having read it.

20 Q Now, Mr. Johann, my question is, since you
21 testified you have no personal knowledge of what Greeff
22 required Belle to do regarding a copyright notice, I am
23 asking you the basis for the statement in your affidavit
24 of what Greeff didn't authorize?

25 A I think the statement says for itself that we

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2 would not authorize the hang tag --

3 Q No, Mr. Johann. It says Greeff has never
4 authorized. Not what it would do but what it did do.
5 I ask you what the basis for this knowledge was.

6 A I don't know what the basis for that knowledge
7 was.

8 Q When you made that statement, did you have such
9 knowledge?

10 A I do believe that they were having a problem.

11 Q No, Mr. Johann, we are talking about authorizations
12 now, not whether there were problems.

13 A But you are asking me something that dates back
14 several months, and you are asking for specifics. I am
15 not going to answer you specifically. So if you are not
16 going to let me develop the answer I am just going to say I
17 don't recall. I mean, why should I say things for your
18 convenience?

19 Q I have no objection, Mr. Johann, if the Court
20 doesn't, to answering any way you think best.

21 A So my answer is I can't recall. I can't say I
22 knew at that exact moment precisely why that statement
23 was made in paragraph one, right now.

24 Q The fact is that you have never had any knowledge
25 of what Greeff authorized Belle to do or didn't authorize

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Johann-cross

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2 Belle to do, is that correct, sir?

3 A No; it is not correct. It is peripheral
4 knowledge.

5 Q Where did you get that peripheral knowledge?

6 A From counsel.

7 Q Is there any statement in this affidavit that
8 says that you were advised by counsel to that effect?9 MR. ROBERT STOLL: Objection. The affidavit
10 speaks for itself, and there is certainly no waiver
11 of attorney-client privilege.

12 THE COURT: All right. I will sustain that.

13 Q Mr. Johann, I show you what purposes to be an
14 agreement dated October 20, 1975, between Greeff and Belle --
15 I should say a photocopy of what purports to be that
16 agreement -- with what appears to be your signature,
17 and ask you if you can identify it.18 (Defendant's Exhibit C marked for
19 identification.)

20 MR. ROBERT STOLL: May I see that?

21 (Pause.)

22 MR. GOLDBERG: Your Honor, I would like to
23 offer Mr. Johann's affidavit, which has been marked
24 Defendant's Exhibit B for identification, as an exhibit.

25 MR. ROBERT STOLL: No objection.

mp:f

THE COURT: Received.

MR. GOLDBERG: I guess it is already a part of the court files.

(Defendant's Exhibit B for identification received in evidence.)

Q Mr. Johann, can you identify the agreement which has been marked Defendant's Exhibit C for identification?

A I can identify it, and it is a photocopy of my signature.

MR. GOLDBERG: Thank you, your Honor, and I offer this in evidence.

MR. ROBERT STOLL: No objection, your Honor, as long as it is a legible copy.

THE COURT: Suppose we take a short recess. We have been going since 9:20.

(Defendant's Exhibit C for identification received in evidence.)

(Recess.)

(In open court.)

Q Mr. Johann, I show you a photocopy of what purports to be an amendment to the agreement of October 20th, which has been marked Defendant's Exhibit C.

(Defendant's Exhibit D marked for identification.)

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Johann-cross

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2 Q Now I ask you, Mr. Johann, if you can identify
3 Defendant's Exhibit D for identification?

4 MR. ROBERT STOLL: I ask counsel whether that
5 document has the witness' signature on it anywhere?

6 MR. GOLDBERG: Counsel, of course, knows that
7 it has the signature of Samuel Stoll. I am not going to
8 make a mystery and ask if Mr. Stoll was authorized to
9 sign it on behalf of Greeff.

10 A Mr. Stoll was authorized to sign it on behalf
11 of Greeff.

12 (Defendant's Exhibit D received in
13 evidence.)

14 Q The exhibit states that Greeff is to be paid
15 \$10,000. Was Greeff paid \$10,000?

16 MR. ROBERT STOLL: I ask that the witness be
17 shown the document --

18 THE COURT: Which document is that?

19 MR. GOLDBERG: Defendant's Exhibit A. The
20 witness hasn't stated he doesn't recall.

21 Q Do you recall Greeff getting \$10,000 from Belle
22 pursuant to that instrument which you are holding?

23 A I do.

24 Q Now, sir, pursuant to this judgment, which is
25 marked Defendant's Exhibit A, did Greeff drop its copyright

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2 infringement suit against Belle?

3 MR. ROBERT STOLL: Objection. Calling for a
4 conclusion on the part of the witness. Possibly a legal
5 conclusion.

6 THE COURT: I will allow him to answer if
7 he knows. He is the executive officer. He ought
8 to know.

9 A We did.

10 Q To your knowledge, sir, did Belle set any
11 conditions at that time with respect to its willingness to
12 enter into this judgment, other than that you would drop
13 the lawsuit?

14 MR. ROBERT STOLL: Objection, your Honor. There
15 are exhibits here, which counsel has entered into
16 evidence, and those exhibits clearly bear on this question
17 and I ask that the witness be allowed to refer to them.

18 THE COURT: Well, he can, if he doesn't remember
19 what the other conditions are.

20 Do you remember without looking at the other
21 exhibits what the conditions were?

22 THE WITNESS: No, your Honor.

23 THE COURT: Well, give him the papers to refresh
24 his recollection.

25 MR. GOLDBERG: Your Honor, I don't know that the

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2 other papers will refresh his recollection. He hasn't
3 said so. His counsel has. I haven't been able to ask
4 a question without an objection.

5 THE COURT: Well, in a nonjury case, it is
6 kind of silly, but this is my 28th year as a judge, and if
7 I can't recognize --

8 THE WITNESS: Would you ask the question again?

9 Q At the time Belle signed this judgment and paid
10 you the \$10,000, did they set any conditions other than
11 that that you would drop the lawsuit?

12 A I must confess I don't recall specifically
13 whether the conditions were set specifically after we
14 dropped the lawsuit.

15 Q What conditions are you referring to, Mr. Johann?

16 A At a later date -- and I can't tell you the
17 exact date -- I reluctantly, and I mean reluctantly,
18 agreed to let them fulfil the commitments that they had
19 made prior to us dropping the lawsuit.

20 Q Well, Mr. Johann, the question was whether
21 Belle had set any conditions --

22 A I don't recall if it was at that point, and
23 that is what I said to you in the beginning.

24 Q I am sorry. I am not sure if I understand your
25 testimony.

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2 Mr. Johann, my question is not what you agreed
3 to but whether Belle set any conditions to its
4 settling the lawsuit other than that you would rop the
5 claim and they would pay you \$10,000.

6 MR. ROBERT STOLL: I object. If the question
7 implies other conditions than are set forth in the
8 agreements I wish he would explain it. The agreements
9 speak for themselves.

10 THE COURT: I am going to allow this man, since
11 he is the executive officer of the corporation, to give
12 his recollection of what his understanding of it was of the
13 conditions of the settlement.

14 The \$10,000 they paid you: Was this damages or
15 for a license as far as you were concerned?

16 THE WITNESS: As far as I was concerned, that
17 was damages.

18 THE COURT: Then you dropped the suit?

19 THE WITNESS: Yes.

20 THE COURT: Were there any other arrangements
21 or conditions set as a result of this judgment?

22 THE WITNESS: We gave them a license.

23 Q To do what?

24 A To dispose of inventory and meet the commitments
25 that they had.

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2 Q When you say "and," does that mean you authorized
3 them to purchase other goods bearing the design?

4 MR. ROBERT STOLL: I object to it.

5 THE COURT: Read the question.

6 (Question read.)

7 THE COURT: I will allow him to answer it.

8 A I honestly don't recall if that was a condition
9 of the license. My concern at that time wasn't to penalize
10 these people, and there was evidence brought forth to me that
11 if we didn't allow them to have the license their business
12 would be put in serious jeopardy, and we didn't want
13 to do that.

14 MR. GOLDBERG: I move to strike it as not
15 responsive, but there is nobody here --

16 THE COURT: I don't know that it answers the
17 question. Maybe if you listen to the question again, you
18 might answer as far as that question is concerned rather
19 than what was your reasoning at the time.

20 (Question read.)

21 Q Other than what they had already had in inventory.

22 A I don't believe that we authorized or it was our
23 intent to authorize them to purchase other goods.

24 Q Are you aware, sir, that at the time this
25 judgment was signed by you, Belle had purchased from abroad

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2 and/or sold no more than 11,000 yards of fabric containing
3 your design?

4 A That is what the judgment says. I just read it.

5 Q Are you aware that to date they have sold 55,000
6 yards under your license?

7 A I am aware of it, but I don't think it is
8 unusual, because I do think they had many, many commitments,
9 and that is what I tried to say to you.

10 Q Mr. Johann, if they had 11,000 yards and under
11 the judgment they sold 55,000 this would strongly suggest
12 that they purchased 55,000 yards?

13 A Yes.

14 Q And you received \$16,000 in royalties?

15 A I don't know the amounts.

16 Q But you received royalties?

17 A That is correct.

18 Q Over the \$10,000 you got in connection with
19 the judgment?

20 A That is correct.

21 MR. GOLDBERG: May I have one moment, your Honor?

22 (Pause.)

23 MR. GOLDBERG: I have no further questions of
24 this witness, your Honor.

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2 REDIRECT EXAMINATION

3 BY MR. STOLL:

4 Q Under the limited license which Greeff granted
5 to Belle --

6 MR. GOLDBERG: Objection, your Honor. There is
7 no suggestion that there was a limited license --

8 MR. ROBERT STOLL: If the phraseology is taken
9 from the license it would be.

10 MR. GOLDBERG: Well, I can't imagine what an
11 unlimited one would be if that is --

12 THE COURT: Well, if there is something that
13 describes it, I will allow it. You can cross examine
14 him to indicate that the word "limited" is really not
15 a correct designation of what in fact the license does.

16 MR. GOLDBERG: Thank you, your Honor.

17 MR. ROBERT STOLL: I will withdraw that, in
18 any event, to avoid implication.

19 Q Mr. Johann, was it your understanding in entering
20 into the settlement arrangement of the Belle litigation
21 with Belle, that Belle was permitted to go out and
22 hunt for new customers under the license agreement?

23 A No, it wasn't.

24 Q Was it your understanding that Belle was to go
25 out and actively promote the pattern which was involved

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2 in the Belle litigation?

3 MR. GOLDBERG: These are very leading questions.

4 THE COURT: They are, with a party to the
5 litigation. Maybe you ought to let him tell you what his
6 understanding was rather than answer leading questions.
7 But he already said that before. He said that before that
8 all he did -- he didn't want them to get hurt and he
9 wanted them to fulfil their orders and that was the end
10 of it, that is what I understood him to say.

11 THE WITNESS: That is what I meant.

12 MR. ROBERT STOLL: I have no further questions.

13 RECROSS EXAMINATION

14 BY MR. GOLDBERG:

15 Q Just one brief question:

16 Mr. Johann, you testified that you granted
17 reluctantly, you granted this license to avoid putting
18 Belle out of business or hurting them very badly, is
19 that correct, sir?

20 A That is correct.

21 Q And is it so, sir, that Belle came to you literally
22 begging you to give them this license?

23 A Not to me personally, but they did to me
24 through counsel.

25 Q And that Belle said to you that they desperately

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2 needed this license to save their business?

3 A I don't think they used those exact words, but
4 they said they would be hurt financially.

5 Q And therefore they asked you to be, in effect,
6 generous with them and grant the license; is that correct,
7 sir?

8 A I think that would be a fair assumption.

9 MR. GOLDBERG: I have no further questions.

10 MR. ROBERT STOLL: No further questions.

11 (Witness excused.)

12 MR. ROBERT STOLL: I call Mr. Daniel Drinkard.

13 D A N I E L M. D R I N K A R D, called
14 as a witness by the plaintiff, being first duly
15 sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. ROBERT STOLL:

18 Q Mr. Drinkard, what is your residence address?

19 A 219 Butterfield Drive, Jamestown, North Carolina.

20 Q What is your present occupation?

21 A President of Stanton-Cooper Upholstery Company.

22 High Point, North Carolina.

23 Q Mr. Drinkard, are you familiar with the upholstered
24 furniture industry?

25 A Yes, I am.

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Drinkard-direct

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2 witness.

3 MR. ROBERT STOLL: I was never asked to identify
4 the witnesses. Moreover, if Mr. Johann doesn't know the
5 answer to the question he certainly can't manufacture
6 for the purposes of the deposition.

7 THE COURT: But the purpose of discovery
8 is to be able to talk to these people and find out what,
9 if any other witnesses, they want to produce.

10 MR. ROBERT STOLL: The question we never posed.

11 THE COURT: If the executive officer says he
12 doesn't know the names the assumption would be that he
13 can't produce anybody. There was no pretrial order here.

14 MR. ROBERT STOLL: No, your Honor.

15 THE COURT: Usually in a pretrial order you
16 put the names of the witness, but as I indicated before,
17 the only relief I see is surprise, and I will allow you
18 to develop any other evidence at a future date which
19 will be in answer to this evidence on his part as far
20 as that is concerned.

21 MR. ROBERT STOLL: That is a rather open-ended
22 invitation, your Honor.

23 THE COURT: Yes, it is, and that is the peril
24 that you are in when you do that. If you were on the
25 other side you would definitely ask exactly the same

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2 questions. You would want to know who they were, and you
3 would want an opportunity to contradict the testimony.

4 I am giving him no more than I would give you
5 in the same position.

6 MR. ROBERT STOLL: I am not suggesting otherwise,
7 except the question of time.

8 THE COURT: Well, nine and a half times out
9 of ten the lawyer says, "The heck with it. I am not going
10 any further with it."

11 We will find out when you both rest.

12 Q I believe you were stating your familiarity, Mr.
13 Drinkard, with the upholstered furniture industry.

14 A From 1965 until 1974 I was employed by the
15 Lane Company. During that time I spent four years in
16 the financial part of the business, and then for four and
17 a half years I was president of Clyde-Pearson Company,
18 which was an upholstery division of Lane.

19 In 1974 I resigned and formed my own company,
20 the Stanton-Cooper Company, as I have stated, which is
21 a manufacturer of upholstered furniture.

22 Q Would you describe the type of business which
23 Stanton-Cooper does?

24 A Stanton-Cooper manufacture sofas and loveseats
25 in the medium to high-price range.

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2 Q Are you familiar with the plaintiff in this
3 action, Greeff Fabrics, Inc.?

4 A Yes, I am.

5 Q Will you please state your familiarity with
6 Greeff?

7 A I have been familiar with Greeff Fabrics since
8 1970, when I came in the upholstery part of the industry.
9 Prior to that I was involved in piecegoods. Greeff
10 Fabrics has the reputation of being a very high style,
11 original, saleable line.

12 When I became president of my company, Greeff
13 wasn't one of the products we had. At that time to improve
14 our position in the marketplace we felt it important to
15 have Greeff Fabrics in our line. Greeff has a rep of
16 being very selective in whom they sell their distribution
17 patterns.

18 At that time I was in New York with the executive
19 vice-president of the Lane Company with the specific purpose
20 of acquiring the Greeff line for the Stanton-Cooper
21 Company, which we did.

22 When I found out that Greeff Company was the
23 line we specifically wanted, because they are well known
24 in the industry and it is highly saleable, and we wanted
25 to buy that fabric line. We did buy that fabric line.

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2 We started our company in July, and we bought that fabric
3 line in the latter part of July. It was, if not the first,
4 the second fabric line which we bought.

5 Q Mr. Drinkard, are you familiar with the symbol
6 which appears on the back of Plaintiff's Exhibit 4 between
7 the words "Malden" and "strike-off", and I hold the exhibit
8 up for your inspection.

9 A The "C" in the circle is a copyright symbol, that
10 is traditionally, as far as I am aware, put on fabric to
11 symbolize that it is copyrighted by the manufacturer.

12 Q What is your understanding of the meaning of the
13 copyright notice, "C" in the circle?

14 MR. GOLDBERG: Objection, your Honor. This is
15 not an attorney witness.

16 THE COURT: Sustained.

17 MR. GOLDBERG: It is a request for a legal
18 conclusion.

19 MR. ROBERT STOLL: Withdrawn. I will rephrase
20 it, your Honor.

21 Q What is your understanding, as one in the
22 industry who deals with these fabrics, of the meaning of
23 such a notice on fabric that you deal with?

24 MR. GOLDBERG: Your Honor, there has been
25 absolutely no testimony by this witness that he's ever

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2 seen a piece of fabric with a "C" in a circle before,
3 that he deals with this sort of fabric.

4 THE COURT: Lay a foundation.

5 Q Have you ever seen fabric that bears the symbol
6 "C" in the circle on it?

7 A Yes, I have.

8 Q Have you seen it frequently?

9 A Yes, I have.

10 Q Have you seen it in the regular course of your
11 business at Stanton-Cooper?

12 A Yes, I have.

13 Q What is the meaning of "C" in the circle to you
14 as an upholstered furniture manufacturer?

15 A It means to me that the company that is manu-
16 facturing that fabric has a copyrighted design on that
17 that they and only they can reproduce. When I look at
18 a fabric that is copyrighted I am under the assumption
19 that the design will not be reproduced by any other
20 company because they have a copyright on that design.

21 Q Does that have any importance to you in your
22 company, Stanton-Cooper?

23 A Yes, it does.

24 Q What is that importance?

25 A Well, specifically, when we know a fabric is

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2 copyrighted we know that the design is not going to be
3 plagiarized or knocked off, as the term is used in the
4 industry, by other people, that we can safely buy the
5 design and put it in our line, that it will be limited
6 to the number of people who manufacture that given design.

7 Q Does your company, Stanton-Cooper, purchase the
8 fabric design of the plaintiff in issue here --
9 and I show you a specimen, Exhibit 3-B.

10 A Yes, we did.

11 Q Do you recognize that fabric?

12 A The fabric is "Contemplation", out of the Greeff
13 line.

14 Q Do you know of your own knowledge whether the
15 "Contemplation" design has a copyright notice on it?

16 A Yes, it does.

17 Q Does that play any part in your purchasing this
18 fabric from Greeff?

19 A Well, as I stated before, one of the things about
20 a Greeff fabric is its individuality. It is recognized
21 in the industry for its design, its coloration, and as a
22 fabric buyer, Greeff fabrics are higher priced than most
23 prints in the marketplace. You pay a premium for a Greeff
24 fabric. Part of the price I pay for the Greeff fabric
25 to me is assuring me that it is not going to be knocked

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2 off by any other print houses or textile houses.

3 Part of the price I pay for Greeff fabric assures
4 me that it is an original design.

5 Q Has there been an impact on Stanton-Cooper based on
6 the existence on the market of the defendant's fabric,
7 Exhibit 4, with the symbol "C" in the circle on the back?

8 A I have no way of stating that. It is my concern
9 that there will be an impact, because of the significance --

10 MR. GOLDBERG: Your Honor, that is not responsive
11 to the question.

12 MR. ROBERT STOLL: I withdraw the question.

13 THE COURT: All right.

14 Q Does Stanton-Cooper purchase fabric in full rolls?

15 A Yes.

16 Q Are you personally familiar with the means used
17 to identify rolls of fabric when they are purchased by
18 companies such as Stanton-Cooper?

19 A Yes.

20 Q Will you identify those means?

21 MR. GOLDBERG: Your Honor, I am going to object
22 to testimony about any other company other than his own.
23 He has had his company for two years. Before that he
24 was a financial officer, with unspecified functions. I
25 don't think he is qualified to testify what other furniture

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2 manufacturers do.

3 MR. ROBERT STOLL: I will be glad to limit the
4 question to his own knowledge and his own company.

5 THE COURT: All right. Go ahead.

6 A The piece ticket is the manufacturer's identifi-
7 cation that is on the roll of fabric. It historically
8 has the manufacturer's name on it. It has the contents of
9 the fabric. It has the yardage on the fabric. It will
10 have many times the repeat of the fabric, the pattern name
11 or number and the color identification.

12 It is used by my company and the company that I
13 was previously responsible for as a means of identifying
14 that particular fabric. The piece ticket is used in your
15 receiving reports to verify the yardage that is indicated on
16 the ticket against what your records show as the yardage you
17 receive. In any company the piece ticket is kept
18 with the fabric until the roll of fabric is used up. We
19 use it to substantiate any claims that we have against
20 the manufacturer as far as quality or number of yards
21 shipped or the proper identification of the pattern itself.

22 Q Are you aware that Malden has fabric on the market
23 corresponding to Exhibit 4?

24 A Yes, I am.

25 Q Are you able to state whether the existence of

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2 such fabric on the market by Malden will have any affect
3 upon your purchases of the Greeff fabric, Exhibit 3?

4 A I currently --

5 MR. GOLDBERG: Your Honor, that has already been
6 asked and answered.

7 THE COURT: No, this is a different question.

8 MR. GOLDBERG: I withdraw the question.

9 THE COURT: The point is, is he going to be
10 affected. Are you going to buy more from Greeff.

11 THE WITNESS: I currently have 20,000 yards to
12 my knowledge or thereabouts on order of that particular
13 pattern with Greeff. It is the number one selling pattern in
14 my line. I have forecasted my needs for December. I am
15 concerned that there are knock-offs in the market --

16 MR. GOLDBERG: Your Honor, I object.

17 THE COURT: That is a different question. The
18 question is, is this going to affect your purchases from
19 Greeff? Answer that yes or no.

20 MR. GOLDBERG: Are we speaking about the copy-
21 right notice?

22 THE COURT: No. It is a question of his intention
23 to buy.

24 MR. GOLDBERG: Isn't that on the question of
25 the damages?

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2 THE COURT: Well, suppose you rephrase the
3 question.

4 Q Are you aware of the existence of Malden fabric
5 containing patterns similar to the Greeff "Contemplation",
6 have a "Malden" "C" in the circle on the back?

7 A I am aware of the pattern not being in existence.
8 I was not aware of the "C".

9 Q All right.

10 If you are informed of the existence of such
11 fabric on the market bearing the "Malden" "C" in the circle
12 strike-off on the back, would you then be able to state the
13 impact that would have upon your purchases of the "Contemplati
14 fabric?

15 MR. GOLDBERG: Objection, your Honor. The wit-
16 ness has already said he never saw it.

17 THE COURT: Well, this is a hypothetical
18 question. I will allow it for whatever it is worth.

19 A Could you give me the question again?

20 (Question read.)

21 Q If you don't understand the question, I can
22 rephrase it.

23 A Would you rephrase the question, please?

24 Q If you were to assume, without knowing it,
25 if you were to assume the fact that there is such Malden

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2 fabric on the market bearing the "Malden" "C" in the
3 circle strike-off on the back, under that assumption,
4 would you be able to formulate an opinion as to the
5 impact of that on your company with regard to the purchases
6 of the Greeff fabric?

7 MR. GOLDBERG: Your Honor, I object to that. There
8 is absolutely no evidence that there is any Malden fabric
9 on the market, as Mr. Stoll put it, with a "C" in the
10 circle on the back. On the contrary, there was never any
11 such thing, as we will show.

12 If we are going to ask a hypothetical, let's limit
13 it to a few strike-offs that may have been in the hands of
14 salesmen and nothing else, not anything on the market.

15 MR. ROBERT STOLL: In response to that, I would
16 refer your Honor to the answer to the amended complaint,
17 Paragraph 6, which indicates that strike offs are never sold
18 or used in any manner except as samples for solicitation
19 of orders.

20 THE COURT: The question you posed is much more
21 expansive than that. It does not incorporate that
22 language in the question. The question now, as put to
23 the witness, would seem to be that these materials were
24 out on the open market rather than in the hands of salesmen
25 who were going around with swatches, or whatever they called

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2 them.

3 Q I then modify the question to ask you to assume,
4 as stated in the answer, that strike-offs such as
5 Plaintiff's Exhibit 4 are being used as samples for the
6 solicitation of orders, and I ask if you are then able, assum-
7 ing that to be a fact, to state whether that would have any
8 impact upon your company's purchases of the Greeff
9 "Contemplation" fabric?

10 A May I ask a question?

11 How you phrased it, it is being used to
12 solicit sales, is that correct?

13 Q Yes, that specimen or ones similar to it.

14 A As I said earlier, that part of buying a Greeff
15 fabric --

16 THE COURT: Wait a minute. The answer is yes or no
17 and then if you are asked for an explanation you can give
18 it later on. If you are not asked, that is the end of
19 it.

20 Q Are you able to give an answer to the question that
21 I posed?

22 A No.

23 Q You are not?

24 THE COURT: All right. Now, that is it.

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2 CROSS EXAMINATION

3 BY MR. GOLDBERG:

4 Q I'm sorry, I didn't catch your name?

5 A Drinkard.

6 Q Mr. Drinkard, who invited you to come here today?

7 A Mr. Stoll.

8 Q And who called you beforehand with respect to this?

9 Who made the first contact?

10 A Mr. Stoll.

11 Q Do you know who told Mr. Stoll to call you?

12 A No, I don't.

13 Q Do you know where he got your name from?

14 A Excuse me. I would assume that Mr. Leighton,

15 the vice-president --

16 MR. ROBERT STOLL: Objection. If the witness
17 cannot state of his own knowledge, I don't believe an
18 assumption would be of any value.

19 THE COURT: That is true. If you don't know, say
20 so.

21 Q I will accept your assumption.

22 A I would assume that Mr. Leighton, vice-president
23 of Greeff, gave him my name, because I have complained
24 to Mr. Leighton about the "contemplation" knock-offs,
25 because we have such a commitment to the pattern.

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2 Q When was the first such complaint that you made
3 to him?

4 A I would say it was when the Belle fabric came out.

5 Q Do you remember when that was, sir?

6 A The "Contemplation" pattern was bought in '74.
7 I believe it was the spring of '75.

8 Q So in the spring of '75 you complained to Greeff
9 that Belle was knocking off "Contemplation" and thereby
10 hurting your sales, is that correct?

11 A Yes, sir.

12 Q And are you aware that thereafter Greeff licensed
13 Belle to continue doing exactly that?

14 MR. ROBERT STOLL: Oh, your Honor. That is
15 a pure conclusion and it is argumentative.

16 MR. GOLDBERG: It is cross examination.

17 THE COURT: I will allow it.

18 Q Are you aware of that, sir?

19 A I am aware of it now, yes.

20 Q Are you aware that Bell has continued to this very
21 day to sell a knock-off of "Contemplation"?

22 A Yes, I am.

23 Q Are you aware that they are selling it at very
24 large quantities in the market?

25 A Yes, I am.

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Q In fact, when you go to the various trade shows
don't you see it, coming and going?

A Yes, you do.

Q When you buy fabric from Greeff, is that confined
to your company? Do you know what that means, by
the way: Confined?

A Yes, sir, I do.

Q Do you have a confinement contract so that they
can't sell it to anybody else?

A No, sir. I have been offered such an agreement.

Q You have been offered it by Greeff?

A Yes.

Q Have you been offered it with respect to
"Contemplation"?

A No. I have not asked for it.

Q And you have not been offered it?

A Yes, I have.

Q With respect to "Contemplation"?

A Yes.

Q When were you offered this confinement contract?

A About six months ago.

Q That would be October or November of last year?

A Yes, sir.

Q And they said they would confine the "Contemplation"

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2 design to your company?

3 A They would confine it to not selling any more
4 accounts on it.

5 Q And did they advise you at that time that they
6 had licensed Belle to sell a knock-off of that "Contemplation"
7 pattern?

8 A No, sir, they didn't.

9 Q You mentioned that Greeff is very selective.
10 By that do you mean that if I am just an unknown -- let's
11 say I want to start as a furniture manufacturer tomorrow
12 and I go over to Greeff's showroom on 55th or 56th
13 Street, wherever it is, in Manhattan, and I walk in and
14 say, "I am a manufacturer of sofas. I would like to buy
15 your fabrics."

16 Now, will they sell to me, to your knowledge?

17 MR. ROBERT STOLL: Objection. This man
18 doesn't represent Greeff. We had a witness on the stand
19 who represented Greeff and could answer the question.

20 THE COURT: Yes, but he asked, "Do you know,"
21 and if he doesn't know except from hearsay -- keep that in
22 mind.

23 A No.

24 Q You don't know that?

25 A No.

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2 Q What do you mean when you say Greeff was
3 selective?

4 A It is my opinion that Greeff is selective in whom
5 they sell, but they tend to sell houses of manufacture
6 of better quality of furniture. By that I mean we
7 match, we tailor, we have a good quality.

8 Q Did you ever hear of anybody who tried to buy
9 from Greeff who was refused?

10 A Yes.

11 Q Who?

12 A The company that I was previously president of
13 couldn't get the Greeff line.

14 Q You feel the Greeff line is very valuable to
15 you, don't you?

16 A Yes, sir, I do.

17 Q And as far as you understand it, Greeff could
18 refuse to sell to you if they wanted to, couldn't they?

19 A I don't think they could at this stage.

20 Q I mean, sell any more fabric, enter into any new
21 contracts.

22 A Yes.

23 Q And you want them to keep selling you, don't you?

24 A Yes.

25 Q And are you here under subpoena today, sir?

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Drinkard-cross

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A No, sir.

Q You are voluntarily?

A Yes, sir.

Q At Mr. Stoll's request?

A Yes, sir.

MR. GOLDBERG: I have no further questions.

MR. ROBERT STOLL: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. ROBERT STOLL: I call Mr. Jeremiah Lewkowicz,
and I believe at this stage his attorney, Mr. Popper,
ought to be called into the courtroom as well.

MR. GOLDBERG: Your Honor, I object to that.
Both of these gentlemen have been subpoenaed by me. If
he wants to call them I ask that he call Mr. Popper first,
so Mr. Popper will not be here when Mr. Lewkowicz
testifies.

THE COURT: I know what you are talking about, but
'I don't believe I can prevent people from calling witnesses.
Under the new rules, I have control as to the order in
which the witnesses should be called.

MR. GOLDBERG: Yes, your Honor.

MR. ROBERT STOLL: It is discretionary.

THE COURT: It would seem to me, it would be fair.

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2 Otherwise there wild be no reason to keep him out.

3 MR. GOLDBERG: Exactly, your Honor.

4 THE COURT: As I indicated to the lawyer, I
5 didn't want him to be affected even subliminally by the
6 testimony.

7 MR. ROBERT STOLL: We aren't calling Mr. Popper.
8 We are calling Mr. Lewkowicz, and notwithstanding Mr.
9 Popper's subpoena, I don't believe it should interfere with
10 my right to call Mr. Lewkowicz.

11 MR. GOLDBERG: I ask Mr. Popper be called now.

12 THE COURT: Did you take a deposition of Mr. Popper.

13 MR. GOLDBERG: We have depositions of both gentle-
14 men, your Honor.

15 THE COURT: Then he would have to contradict
16 his own statements. Since you have had an opportunity to
17 have him under deposition, I would allow him to be in the
18 courtroom.

19 MR. GOLDBERG: I am sure he would not testify
20 untruthfully, but as your Honor stated he could be
21 affected subliminally.

22 THE COURT: Well, since there is a deposition in
23 the case and you can go back into the deposition I will allow
24 him to be present.
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2 J E R E M I A H L E W K O W I C Z, called
3 as a witness by the plaintiff, being first duly
4 sworn, testified as follows:

5 MR. ROBERT STOLL: Just so the record is clear,
6 your Honor, one further statement with respect to your
7 permitting Mr. Popper to be here:

8 Mr. Popper was present at Mr. Lewkowicz'
9 deposition. In fact it was taken in Mr. Popper's office.

10 DIRECT EXAMINATION

11 BY MR. ROBERT STOLL:

12 Q Mr. Lewkowicz, will you state your residence
13 address?

14 A 1310 Alexander Avenue, Fairlawn, New Jersey.

15 Q And what is your occupation?

16 A President of Belle Fabrics, Inc.

17 Q Mr. Lewkowicz, I show you a fabric which has been
18 entered as Plaintiff's Exhibit 6 and I ask you if you have
19 ever seen the pattern which is shown in this fabric?

20 A Yes.

21 Q Will you please state where you have seen this
22 pattern before?

23 A This sample or the design?

24 Q The design.

25 A The design, Belle Fabrics is running this design

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2 for many, many years in our line.

3 Q I hand you a specimen of fabric and ask you
4 if you can identify it?

5 A Yes.

6 MR. ROBERT STOLL: I ask that this be marked as
7 Exhibit 9.

8 (Plaintiff's Exhibit 9 marked for
9 identification.)

10 Q Could you please identify Exhibit 9 to the
11 Court?

12 A Yes, it is a pattern we call "Monroe", color
13 33.

14 Q Is this your own fabric, the Belle Company fabric?

15 A Yes.

16 MR. ROBERT STOLL: I ask that this be entered
17 in evidence.

18 MR. GOLDBERG: I have no objection.

19 (Plaintiff's Exhibit 9 received in
20 evidence.)

21 Q I put your fabric, Exhibit 9, and Malden fabric,
22 Exhibit 6 side by side and I ask you whether they are the
23 same?

24 MR. GOLDBERG: Your Honor, I object to the
25 question. Is this a new copyright case that is just

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2 stated?

3 MR. ROBERT STOLL: If it please the Court, we have
4 testimony in the depositions in this case that Malden
5 doesn't copy, and I am demonstrating here that indeed
6 Malden does copy.

7 MR. GOLDBERG: What?

8 MR. ROBERT STOLL: And is in fact known in the
9 industry as a knock-off house, and the fact is that by a
10 strange coincidence they knocked off to my knowledge, two of
11 the patterns of Belle Fabrics involved in prior litigation,
12 and in support of this I read to your Honor from
13 page 70 of the deposition of Mr. Sanford Levine in
14 which a question is asked:

15 "Q Do you have any knowledge of any other Belle patter.
16 that Malden has copied?

17 "A To the best of my knowledge, we have not.

18 "Q Who would know?

19 "A I should know."

20 MR. GOLDBERG: Your Honor, obviously we at
21 the deposition reserved our right to object to a question for
22 irrelevance. We object to this question as wholly
23 irrelevant, whether Malden knocked off Belle at any time
24 or any other company is irrelevant. I think Mr. Stoll's
25 gratuitous remark about being known as a knock-off company

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2 is so inflammatory that if there was a jury here I would
3 have to ask for a mistrial.

4 I am flabbergasted that the suggestion should
5 be made in that manner.

6 THE COURT: I will reserve decision in this
7 matter. Do you have any cases that this is allowable?

8 MR. ROBERT STOLL: I offer this as proof of
9 conduct, your Honor, and credibility of witness. The
10 only witness who could identify the Belle fabric would be
11 a representative of Belle.

12 THE COURT: I will reserve decision on the
13 introduction of this No. 9.

14 MR. GOLDBERG: Your Honor, I am looking for the
15 specific rule of the new federal rules of evidence which
16 specifically provides that evidence of a course of conduct
17 cannot be used in this manner and certainly I have never
18 heard in a copyright infringement case you can show
19 that a defendant infringed somebody else's copyright
20 and bootstrap yourself into an infringement.

21 MR. ROBERT STOLL: Well, infringement is admitted
22 in the pleadings and as far as the federal rules are
23 concerned it is my understanding that that refers to
24 criminal conduct. You can't use a course of conduct to
25 impute a criminal activity. That is not involved.

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2 MR. GOLDBERG: I will find the rule. It is
3 a civil rule.

4 THE COURT: Well, I know the rules, but I
5 don't know of any case that allows that and I should like
6 you to give me some law on it.

7 MR. ROBERT STOLL: I will, your Honor, and I
8 would like to present Malden's fabric Exhibit 7 and a
9 fabric which I ask be marked.

10 (Plaintiff's Exhibit 10 marked for
11 identification.)

12 MR. GOLDBERG: Your Honor, before I think we can
13 go any further, can we find out if that Belle fabric was
14 copyrighted?

15 MR. ROBERT STOLL: You may ask the question of
16 the witness at the time of your examination.

17 MR. GOLDBERG: It is a necessary foundation,
18 your Honor. Before you can knock somebody off they have
19 to have a copyright; otherwise it is public domain and it
20 is free for anybody to use.

21 THE COURT: I think it is a fair question.

22 MR. ROBERT STOLL: We aren't in response
23 to an earlier question making out two new cases of copyright
24 infringement. The offer of proof is to show course of
25 conduct.

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2 THE COURT: How is he violating any law.
3 What course of conduct? A lot of manufacturers must take
4 articles in the public domain and use them. It is a
5 question of whether they take copyright articles and infringe.
6 That is critical in our case.

7 MR. ROBERT STOLL: Your Honor stated you would
8 take this subject to our providing a case to you and
9 I certainly accept that.

10 THE COURT: Well, all right, but I would still
11 like to know whether these were copyrighted. What is the
12 fact?

13 Q Mr. Lewkowicz, were either of your fabrics, Exhibit

14 A No.

15 Q -- or 10 for identification copyrighted by Belle,
16 to your knowledge?

17 A No.

18 THE COURT: I will reserve on it, but frankly I
19 don't think they have any relevance at this point. You
20 will have to persuade me otherwise.

21 MR. ROBERT STOLL: Then just let me finish up
22 the question subject to your Honor's ruling.

23 Q Mr. Lewkowicz, do you recognize Exhibit 10 for
24 identification?

25 A Yes.

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2 Q Will you describe it?

3 A It is our design, we call it "Castle."

4 Q I show you Exhibit 7, which is a Malden fabric, and
5 your fabric, Exhibit 10, and ask you whether the patterns
6 are the same?

7 A That's right.

8 MR. ROBERT STOLL: If it please the Court,
9 one other matter of relevance here which I neglected to
10 mention, and I am sorry, is that Exhibit 6, the Malden fabric,
11 has a copyright notice on it, and this is directly in
12 point in connection with the second cause of action,
13 namely, the application of a Malden copyright notice to a
14 fabric pattern, which is not of Malden's own creation,
15 but is a knock-off. That is not true, I hasten to add,
16 with respect to the second. We don't have a strike-off
17 with the Malden "C" in the circle on that.18 MR. GOLDBERG: Your Honor, we have already
19 stipulated at Mr. Stoll's request that as of March 19th
20 of this year all of Malden's print patterns in fact had
21 strike-offs with "C" in a circle although we don't claim
22 copyright with any of them. It is already stipulated.23 With respect to these two items, the one with the
24 "C" in the circle we assume must have been done before
25 March 19th and the one without the "C" in the circle after

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2 March 19th. That is stipulated.

3 THE COURT: Well, you can argue that later. At
4 this time I will reserve on whether I am taking them or not.

5 MR. ROBERT STOLL: Reserving all rights to further
6 examine this witness if the witness is called by the
7 defendant as its own witness. I have no further questions
8 at this time.

9 MR. GOLDBERG: Your Honor, we certainly ask the
10 Court's indulgence to finish with Mr. Lewkowicz so he
11 doesn't have to stay around and testify twice.

12 THE COURT: All right.

13 MR. ROBERT STOLL: Your Honor, I have been
14 instructed by senior counsel, a few further questions, if
15 I may.

16 BY MR. ROBERT STOLL:

17 Q Mr. Lewkowicz, was your company, Belle, sued
18 by Greeff Fabric in connection with the "Contemplation"
19 fabric design?

20 A I would say a lawsuit -- what do you mean by
21 suit?

22 We were served papers.

23 Q Were you involved in a controversy?

24 A Yes.

25 Q Was that controversy settled?

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2 A Yes.

3 Q I hand you Defendant's Exhibits A and C,
4 funnelling them through your counsel, and I will be asking
5 you whether you recognize those documents as being the settle-
6 ment of the controversy between Greeff and Belle.

7 THE COURT: I don't know how he could claim
8 any privilege with respect to that. They are public re-
9 cords. I can't understand that.

10 MR. ROBERT STOLL: As a matter of fact,
11 I would like to point out one paragraph in the consent
12 judgment signed by Judge Lacey, in the District of New Jersey,
13 that is, the district in which the Greeff v. Belle took place
14 paragraph 8, indicates today neither party should publicize
15 this judgment without the consent of the other party, and
16 we certainly don't believe that this constitutes publication
17 in the general sense.

18 A Well, this is my signature. Yes. That's
19 my signature.

20 Q Okay. You recognize copies of your signature
21 on these documents?

22 A Right.

23 Q Mr. Lewkoeicz, did you request Greeff to issue
24 the license which is represented by Defendant's Exhibit C?

25 A Yes.

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2 Q You did?

3 A Yes.

4 Q What was the purpose, sir, of requesting
5 Greeff to issue that license?6 A Well, so I could fulfil out my obligations
7 to our customers. I can fill the orders and obligations to
8 them.9 Q Is that what you have been doing in connection
10 with your sales of the Belle Fabric in question, since
11 the date of settlement?

12 A That's right.

13 Q Have you ever solicited new customers in con-
14 nection with the fabric that was involved in that liti-
15 gation, the Belle litigation?

16 A New sales?

17 Q New customers.

18 A No, we have no new customers. All old custo-
19 mers.20 MR. GOLDBERG: Your Honor, I don't know what
21 the phrase new customers means. Is it someone they never
22 sold to before?23 THE COURT: You can ask him when you get him
24 on cross examination.

25 MR. GOLDBERG: All right.

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2 Q At the time of entering into that license
3 agreement, Exhibit C, did you issue any instructions concern-
4 ing your salesmen's samples of the fabric that was in-
5 volved at that time or showroom samples?

6 A The samples only or the goods?

7 Q The samples that salesmen may have had.

8 A We had to remove all the samples from the
9 salesmen in the showrooms.

10 Q Since the date of that license agreement,
11 the settlement of the Greeff v. Belle litigation --

12 MR. GOLDBERG: Your Honor, I am going to object
13 to that characterization. There has been no testimony that
14 the license agreement was entered into to settle the liti-
15 gation. There was a judgment entered into to settle
16 the litigation.

17 THE COURT: Rephrase the question.

18 MR. ROBERT STOLL: On the contrary, your
19 Honor, the settlement agreement refers to the license in
20 words, and I believe --

21 THE COURT: Well, what's the question?
22 Whether he has any new customers? What do you want to
23 ask him about now? That's only a date. We want to know
24 what kind of conduct he carried on after that date, as
25 far as that document is concerned.

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Lewkowicz-direct

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Q Since entering into that agreement, Mr.

Lewkowicz, have you complied to the best of your ability with all the conditions of that agreement?

A Yes.

Q Mr. Lewkowicz, since entering into that agreement, have you or your company, Belle, ever promoted the Belle fabric design that was involved there? Have your salesmen ever pushed it, to use industry language?

A No.

MR. GOLDBERG: I would object to the question. The license agreement which is in evidence gives Belle specifically the right to promote the design.

THE COURT: Those are actually two questions and I will sustain it for that reason, because I don't know what he was answering yes to.

Q Has Belle pushed that fabric since the date of settlement?

A No.

Q The fabric referred to in the license agreement?

A No.

Q Did there come a time, Mr. Lewkowicz, when you requested an extension of the license agreement which is Exhibit C?

A Yes.

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Q What was the reason for your requesting such an extension?

A Still to finish off orders and commitments to our customers.

MR. ROBERT STOLL: Subject to, once again, re-examining this witness if the defendant calls him as their own witness, as we have discussed before, I have no further questions of him.

CROSS EXAMINATION

BY MR. GOLDBERG:

Q Mr. Lewkowicz, you are the president of Belle, are you not?

A Yes.

Q You have been that for about 30 years?

A Yes.

Q And you are in fact one of the founders of the company, aren't you?

A Yes.

Q Your business is importing textile fabrics and selling them within the United States?

A Yes.

Q I am going to show you a piece of fabric, Mr. Lewkowicz, and ask you if you can identify it.

(Defendant's Exhibit E was marked for

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2 identification.)

3 MR. ROBERT STOLL: May I ask counsel if this
4 is an exhibit that has previously been shown to the Court?

5 MR. GOLDBERG: It is with an exception.
6 It was Defendant's Exhibit A for identification. However,
7 there are a couple of notations on the back of the fabric
8 that weren't there then. I will ask this witness
9 to disregard anything on the back of the fabric at the moment.

10 MR. ROBERT STOLL: May I ask the purpose
11 for your introduction or use of this proposed exhibit?

12 MR. GOLDBERG: I am astonished. This is the
13 Belle fabric that we got, as you know from your depositions
14 in the marketplace around November 10th of 1975. This is
15 the piece of fabric without any copyright notice that led
16 us to go ahead and copy the design, because we assumed
17 it was in the public domain.

18 MR. ROBERT STOLL: If it please the Court, this
19 is a crucial issue. Unless it can be shown that this
20 particular fabric was sold by Belle prior to the date of
21 the license agreement -- after the date of the license
22 agreement, it would have absolutely no relevance to the
23 issues here.

24 THE COURT: Well, I don't know what it is
25 going to show. But this man is a chief executive

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Lewkowicz-cross

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officer of his company; if he can't recognize his own material I would suspect nobody can.

MR. ROBERT STOLL: There's no argument that he can't recognize it. There is testimony in the depositions --

THE COURT: I don't know anything about the depositions. They haven't been brought to my attention. I overrule the objection, and I see no need for a further offer of proof in this.

MR. GOLDBERG: Thank you.

Q Mr. Lewkowicz, I show you a piece of fabric marked Defendant Exhibit E for identification and ask you if you can identify the fabric, sir?

A I will have to unroll it.

MR. GOLDBERG: Tom, could you help him out, please?

A Okay. It looks like one of our materials.

Q To your knowledge, Mr. Lewkowicz, is that the fabric which you imported which contains the Greeff "Contemplation" design?

A Yes.

Q Yes, it is?

A Yes.

Q Sir, can you tell by looking at that piece

1 mpbr Lewkowicz-cross 88
2 of fabric, without any other identification by the fabric
3 itself, can you tell when you would have imported that
4 into the United States?
5 A No way.
6 Q Is it possible for anybody to tell that?
7 A No.
8 Q I show you another piece of fabric,
9 Mr. Lewkowicz --
10 (Defendant's Exhibit F was marked for
11 identification.)
12 Q I ask again whether this is the same fabric
13 which has previously been used in this case?
14 MR. GOLDBERG: Yes, it is. This is the one
15 with the Belle hang tag on it.
16 MR. ROBERT STOLL: Are there any imprints on the
17 fabric that were not there when it was last introduced to
18 the Court?
19 MR. GOLDBERG: Not to my knowledge. No.
20 Q Mr. Lewkowicz, I ask you if you can identify
21 this piece of fabric which is marked Defendant's Exhibit F
22 for identification.
23 A Yes.
24 Q And is that fabric that Bell imported which
25 contains the Greeff "Contemplation" design?

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Lewkowicz-cross

2 MR. GOLDBERG: I offer both of these pieces
3 into evidence.

4 MR. ROBERT STOLL: I object unless it can be
5 sold by Belle at a time when it had the right to place a
6 Greeff copyright notice on it, after the date of the license.

7 THE COURT: I will take it subject to con-
8 nection.

9 (Defendant's Exhibits E and F were received
10 in evidence.)

11 MR. POPPER: May I direct the attention of
12 the court that the second of these two exhibits contains
13 a tag stapled to it and there appears to be a rubber
14 stamp copyright notice on it.

15 THE COURT: What about it?

16 MR. POPPER: That would appear to date this
17 after the time the plaintiff in this case supplied the
18 rubber stamp notice to Mr. Lewkowicz.

19 MR. ROBERT STOLL: That might be so.

20 MR. GOLDBERG: I am going to ask Mr.
21 Lewkowicz about it.

22 THE COURT: I have seen that before.

23 Q Mr. Lewkowicz, I call your attention to the
24 yellow hang tag which is on the fabric marked Defendant
25 Exhibit F which you are holding on your desk right now.

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Lewkowicz-cross

2 Mr. Lewkowicz, when you were deposed, did I ask you to try
3 to ascertain from the number on that tag when you imported
4 this piece of fabric?

5 A Yes.

6 MR. ROBERT STOLL: Objection, your Honor.

7 Q Did you make a phone call?

8 MR. ROBERT STOLL: Objection. That was not
9 the point at all and there is confusion engendered by that
10 question.

11 MR. GOLDBERG: Can I please continue with my
12 examination, your Honor?

13 MR. ROBERT STOLL: I would like to know who
14 attached the tag to the fabric. I have no objection to the
15 tag, copyright notice, but unless we know that that tag
16 was attached to this fabric by Belle, we cannot assume that
17 this fabric bears the same information as on the tag.

18 THE COURT: I think that's a subject for cross-
19 examination. I will allow it.

20 Q I will start again.

21 Mr. Lewkowicz, at my request did you call
22 the people in your organization to determine whether you
23 placed the order for the goods represented by that tag?

24 A Yes.

25 Q And does that mean that it imported it prior

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Lewkowicz-cross

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2 to January 26th?

3 A I don't recall what date I said at this time.
4 It's probably on the deposition.

5 MR. GOLDBERG: I would simply refer the Court
6 to Page 123 of the deposition of Mr. Lewkowicz, in which Mr.
7 Lewkowicz stated that it came in on or about January 20, 1976.
8 He couldn't be certain of the exact date, but it was around
9 that.

10 MR. POPPER: I have a copy of the transcript.
11 May I show it to the witness for refreshing his recol-
12 lection?

13 THE COURT: No, not at this time. You have no
14 standing at this time actually. The reason you are
15 here is to protect his interests as far as certain confi-
16 dential records and so forth are concerned. You are not a
17 litigant in this matter, and I don't think you should take
18 part as a litigant in this matter, because you are taking
19 sides and really you shouldn't take sides; you should
20 protect your client's rights in the areas that you have
21 indicated to the Court that you want to protect.

22 Now, none of this has got anything to do with
23 your function at all at this point. There's nothing
24 about how many sales he made, who he made the sales to.
25 Rather than become a party to this lawsuit I would suggest

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Lewkowicz-cross

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2 that you wait until we get to those issues where your
3 client's interests are involved.

4 MR. POPPER: I didn't mean to interrupt.

5 THE COURT: Well, we have two litigants here
6 who are eager to use to use the old common law adversarial
7 method of riding at each other with lances. You don't have
8 to help them. Believe me. I have these gentlemen before
9 me numerous times.

10 Q Mr. Lewkowicz, does anyone else, to your
11 knowledge --

12 MR. GOLDBERG: Strike that.

13 Q Does anyone else to your knowledge import
14 the fabric or any fabric similar to the fabric which you are
15 holding now, which has been marked Defendant's Exhibit F?

16 A What do you mean by similar?

17 Q Well, let us start with virtually identical.

18 A Identical, not to my knowledge.

19 Q You are the only one, as far as you know, that
20 has imported this fabric?

21 A Yes.

22 Q Now, sir, is it true that on or about
23 October 14, 1975 -- I don't mean for you to remember an
24 exact date, but in that general area -- that you received
25 papers from Greeff in which they claimed that you were

1 mpbr

2 infringing their "Contemplation" copyright?

3 A Yes.

4 Q Had you received any prior notice from them
5 that they claimed copyright in the "Contemplation" design?

6 A Notice? You mean official?

7 Q Had they called you or written to you before
8 that date to warn you that you were an infringer?

9 A No. I don't recall if there was a phone
10 call or something like that prior to the --

11 Q The papers?

12 A Prior to the papers, sir. I don't recall
13 exactly.

14 Q Now, sir, at that time, did you retain Mr. Popper
15 as your attorney to represent you in your dispute with
16 Greeff?

17 A Right.

18 Q Did you agree, in order to settle the dispute
19 with Greeff, that you would pay them \$10,000 and sign a
20 judgment, which has been marked Defendant's Exhibit A,
21 and which I hand to you now?

22 A I thought we aren't going to talk about
23 money. Well, it's right there on the judgment.

24 Q And you agreed to pay them \$10,000?

25 A Yes.

1 mpbr

2 Q Is your signature on that?

3 A Yes.

4 Q Did you pay them the \$10,000?

5 Q Yes.

6 Q When you signed this judgment --

7 MR. GOLDBERG: Strike that.

8 Q Did you have any personal discussions with
9 Greeff or Greeff's attorneys in connection with settling
10 your dispute?

11 A No.

12 Q Did somebody carry discussions on for you?

13 A Yes.

14 Q Who was that?

15 A My attorney.

16 Q Mr. Popper?

17 A Yes.

18 Q And were you in fact waiting in the anteroom
19 in the offices of Greeff's attorneys while the negotiations
20 were going on?

21 A Yes.

22 Q And did Mr. Popper come out with the agreement,
23 read it to you, and you discussed it and you signed it?

24 A Yes.

25 Q Now, sir, at that time that you did enter into

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Lewkowicz-cross

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1 this judgment, did you tell Greeff that you would not agree
2 to this unless they agreed to give you a license?
3

4 A No.

5 Q They didn't?

6 A I don't remember.

7 Q Did you tell your attorney to do anything like
8 that?

9 A I don't remember saying anything like that.

10 Q Did you instruct your attorney to try to get
11 you a license, if he could?

12 A Yes, sure.

13 Q Now, sir, at the time the license was entered
14 into it states that you had purchased or sold not more than
15 11,000 yards of the fabric in question. Is that correct,
16 to the best of your recollection?

17 A Probably. I'm not sure about exact yardage.

18 Q In fact, sir, on or about October 20th,
19 at the time you entered into this, you didn't have any fab-
20 ric in stock?

21 A No. I don't think so. I can't recall if I
22 had a yard or 20 yards or a hundred yards. I don't recall.

23 Q But you didn't have any substantial quantities?

24 A No, I didn't.

25 Q So your purpose in getting a license was not

1 mpbr

Lewkowicz-cross

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2 to sell off existing inventory but to purchase new goods
3 from Belgium and sell that?

4 A No, these purchases were made a long time
5 before that. The goods were in production. We have to re-
6 ceive it. Maybe a lot of it was travelling on the ocean
7 already.

8 Q And normally, how long would it take the lot
9 that was travelling to arrive at your premises?

10 A Travelling on the ocean?

11 Q Yes.

12 A About two weeks.

13 Q Do you recall how much you had on the ocean at
14 this time?

15 A No.

16 Q Anything substantial?

17 A I don't recall now.

18 Q As a matter of fact, didn't you sell under
19 the agreement 55,000 yards of the "Contemplation" design?

20 A Yes.

21 Q From the date of the October 1975 agreement
22 until today?

23 A I don't know. If you would have the record --

24 Q Does it sound in the area?

25 A I don't remember, yes, approximately. I don't

1 mpbr

2 recall exactly how many yards.

3 Q Mr. Lewkowicz, have you been providing
4 Greeff's attorneys, Stoll & Stoll, with monthly reports show-
5 ing the amount of your fabric, which I believe you call
6 Camelot?

7 A Yes.

8 Q Camelot is the knock-off of "Contemplation"?

9 A That's the name of our design.

10 Q And have you been providing Stoll & Stoll
11 with monthly reports showing the amount of "Contemplation"
12 in stock at that point, the amount you received from your
13 supplier and a statement showing that you had to pay 30
14 cents in royalty and you paid it? It is a lot of questions.

15 A It is a question I will answer if the Court
16 will order me to answer, but I don't think I should tell my
17 competitors my business. How much goods I am selling
18 or how much royalties I am paying or anything like that.

19 Q Mr. Lewkowicz, I show you a series of documents
20 which I would ask be marked as one exhibit.

21 (Defendant's Exhibit G was marked for
22 identification.)

23 Q -- which appear, Mr. Lewkowicz, to be the
24 monthly reports in question, and I ask you if you can identify
25 them.

2 MR. ROBERT STOLL: I would state that those
3 were provided to the defendant under the stipulation of
4 secrecy.

5 THE COURT: I don't know why you need this
6 testimony. Aren't you willing to stipulate this?

7 MR. ROBERT STOLL: I am just asking the
8 witness has he named a statement of his concern in supplying
9 these numbers to competitors and I was merely saying that
10 there is a stipulation here of confidentiality with re-
11 spect to sales figures, and counsel had agreed, in receiv-
12 ing these documents, to attach the provisions of that
13 stipulation to these documents.

14 THE COURT: Well, it seems to me that you could
15 stipulate this and keep that as a sealed part of this
16 record.

17 MR. ROBERT STOLL: This is what I am suggesting.

18 MR. GOLDBERG: No objection, your Honor.

19 THE COURT: All right. Then that portion
20 of it will be sealed. The figure, however, is 55,000.

21 MR. ROBERT STOLL: I have not added the figures.
22 It remains to be seen.

23 THE COURT: How much have you sold since the
24 date, October 20th --

25 THE WITNESS: These are the papers right here.

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2 MR. GOLDBERG: We have added it up, your
3 Honor, and have prepared a sheet showing yardage shipped
4 each month.

5 THE COURT: Show it to Mr. Stoll, and if he agrees
6 that can be sealed, and you don't have to do anything in that
7 area.

8 MR. ROBERT STOLL: This is a typewritten
9 sheet prepared by the attorney. Without checking the
10 figures --

11 THE COURT: All right. That will be
12 sealed and added to the record. Mark it as an exhibit.

13 (Defendant's Exhibit H was received in
14 evidence.)

15 THE COURT: It is received in evidence but
16 under seal. It will be opened only by order of the Court.

17 MR. GOLDBERG: At the request of Mr. Stoll
18 I am providing him with a copy of those figures.

19 Q Now, Mr. Lewkowicz, isn't it true, sir, that
20 your sales have this fabric, if your Camelot fabric contain-
21 ing Greeff's "Contemplation" design under the license,
22 have been getting better and better and better as you have
23 gone along, to date?

24 A The sales or the shipments?

25 Q Shipments.

1 mpbr Lewkowicz-cross 100

2 A Shipments, maybe yes.

3 Q In fact, sir, although in October of 1975 you

4 shipped, according to your statements, a thousand yards,

5 approximately, in June of this year you shipped 9400 yards

6 of this fabric. Is that not so, sir?

7 A What is the first figure?

8 Q One thousand yards in October.

9 A Yes, but that was only for a period of ten

10 days.

11 Q I see. So you would have had about 3,000 that

12 month?

13 A Something like that.

14 Q And now you have got 9400 in June?

15 A Yes; I can explain this also.

16 Q I think your attorney might ask you, but I

17 wouldn't ask you that now.

18 Now, sir, did you ask for their license?

19 A Yes.

20 Q And did you, through your attorney, tell Greeff

21 that you would do whatever they reasonably asked you to

22 do so you could continue to sell?

23 A I don't know what terms I told him. I just

24 asked them for a license.

25 Q Did you receive a rubber stamp from the attorneys

1
2 for Greeff?

3 A Yes.

4 Q Were you told that this was the rubber stamp
5 that you were to use to apply the copyright notice to
6 your fabric?

7 A Yes.

8 Q Could that rubber stamp be used to apply a
9 copyright directly to the fabric?

10 A I doubt -- no.

11 Q It couldn't be?

12 A No.

13 Q Could it be used to apply a copyright notice
14 to the hand tag that you used with your fabric?

15 A Yes.

16 Q Were you told by anybody at that time that you
17 were to put a copyright notice either at every repeat or
18 six times a piece or any number of times a piece?

19 A I don't remember what exactly the repeats or
20 how many tags were put on it; just that I have to put on
21 it notices.

22 Q And did you put on the notices?

23 A Yes. Not I personally, but my people.

24 Q I understand that. And you put it under the
25 license by applying the stamp to your piece ticket or

1 mpbr Lewkowicz-cross 102
2 hang tag, either front or back or both, is that correct?

3 A Yes.

4 MR. ROBERT STOLL: I object to the use of the
5 word "hang tag." We contend it is not a hang tag.
6 It is a piece ticket and that's a very significant differ-
7 ence for us.

8 MR. GOLDBERG: Well, the witness has been
9 answering questions on hang tags over and over.

10 THE COURT: All right. You can take that
11 up at cross examination.

12 I have a hearing set down at 2:15, the
13 Day Care Center people.

14 We will recess for lunch until 2:15.

15 (Luncheon recess.)
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2 A F T E R N O O N S E S S I O N

3 2:15 p.m.

4
5 J E R E M I A H L E W K O W I C Z, resumed.

6 CROSS EXAMINATION (Continued)

7 BY MR. GOLDBERG:

8 Q Now, Mr. Lewkowicz, after the license was
9 entered into, on or about October 20, 1975, did you under-
10 take to see that every bolt of fabric that left your
11 premises had a Greeff copyright notice on the tag,
12 whether we call it for the moment hang tag or piece ticket?

13 A On the ticket, yes.

14 Q Yes: You did?

15 A Yes.

16 Q And as far as you know, every bolt of fabric
17 which left your premises after that date did have such a
18 notice on them, is that correct?

19 A Yes.

20 Q If you had any fabric on hand at that time point
21 in your premises, did you undertake to put the notice on tht?

22 A That is right.

23 MR. ROBERT STOLL: Objection, at what point?

24 MR. GOLDBERG: Immediately after the license
25 was entered into.

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Lewkowicz-cross

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2 A You mean after it was signed?

3 Q You tell me how long it took to get the
4 notice on the fabric after it was signed?5 A If I recall correctly, if I had any fabric
6 on hand that day. I don't remember, and second, until I
7 got the stamp, I didn't ship any goods out, from the day of
8 signing the agreement.9 Q In other words, you waited until the Greeff's
10 attorneys gave you the stamp?

11 A Right.

12 Q And then you took the stamp and put it on any
13 bolt of material that you had in stock and any goods you
14 got in?15 A That is right. I am saying I don't remember
16 if I had any goods in stock at that time.

17 Q I understand that.

18 Now, sir, do you recall, on or about March --
19 I think it's 17, 1976, this year, signing an affidavit
20 at the request of Mr. Stoll --21 MR. GOLDBERG: I am going to ask that the
22 affidavit be marked.23 (Defendant's Exhibit I was marked for
24 identification.)

25 Q I am going to show you a copy of it, a photo-

1 mpbr Lewkowicz-cross
2 copy, and ask you if you recall executing that affidavit,
3 sir.

4 A You want me to verify this is my signature?

5 Q It's very hard to read there, but your signa-
6 ture --

7 A Yes. I can't see.

8 Q Yes, I know.

9 A I didn't see anything on my signature, above
10 my name.

11 Q I realize that.

12 MR. ROBERT STOLL: We will concede --

13 A I don't know.

14 Q Mr. Lewkowicz, do you have a recollection
15 that you did in fact sign such an affidavit?

16 A May I read it?

17 Q Please read it.

18 A Yes, it looks like it. I recall this.

19 Q You recall this?

20 A I mean, I didn't read everything here, but I
21 recall signing a document like this.

22 MR. GOLDBERG: All right. This is already
23 a part of the Court file. If the Court wishes we can add
24 it to the evidence now. Perhaps that would be the
25 simplest.

1 mpbr

Lewkowicz-cross

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2 All right. I will offer that in evidence.

3 MR. STOLL: No objection.

4 (Defendant's Exhibit I for identification
5 was received in evidence.)6 Q Let me leave this exhibit with you, Mr.
7 Lewkowicz.8 Now, when you signed that, were you in Mr.
9 Stoll's office?

10 A Yes.

11 Q And was this typed at Mr. Stoll's direction?
12 I mean, it was typed by his office?

13 A Yes. I guess so.

14 Q Did you discuss the facts with Mr. Stoll before
15 you signed the affidavit?16 A Naturally. I wouldn't sign just a blank --
17 just anything.18 Q Mr. Lewkowicz, the statement is made in Para-
19 graph 3 of your affidavit of March 17th, which is Defendant's
20 Exhibit I "I have at all times scrupulously applied the
21 Greeff copyright notice to all Camelot fabric sold or
22 displayed in any form, in strict accordance with the
23 requirement of limited license."24 Now, sir, was that statement put in here at your
25 dictation or, if you know, at Mr. Stoll's?

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1 A I wouldn't remember that.

2 Q Well, did you --

3 A I wouldn't remember.

4 Q At that time, before you signed it, before it
5 was even typed, did you tell Mr. Stoll that you had applied
6 the copyright notice by taking his stamp and putting it on
7 the tag?

8 A I would assume. I wouldn't remember if I told
9 him exactly what I did. I told him I am applying the
10 copyright notice.

11 Q And did he then tell you that in his opinion
12 that was in strict accordance with the requirements of your
13 license with Greeff?

14 A I don't remember if at that time he told me.
15 Not according to the license. At that time or some other
16 time. I don't remember if it was done the same time when
17 this paper was signed or any previous to that or after
18 that. I don't remember that. But he had told me at that
19 time that we have to apply a different method of the copy-
20 right notice.

21 Q Well, Mr. Lewkowicz, would it help you if I
22 gave you a copy of your affidavit dated April 23, 1976,
23 which I am going to ask to have marked, in which you said
24 that you were just informed that the notice had to be differ-
25

1 mpbr

Lewkowicz-cross

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2 ent?

3 A Well, that's what I said. I didn't remember
4 exactly the date.

5 (Defendant's Exhibit J was marked for
6 identification.)

7 MR. ROBERT STOLL: Are there exhibits annexed
8 to it?

9 MR. GOLDBERG: No; there are no exhibits an-
10 nexed to it.

11 MR. ROBERT STOLL: If that's an incomplete
12 affidavit with no exhibits annexed to it I object as
13 an incomplete exhibit.

14 MR. GOLDBERG: This is a 22-page affidavit
15 with what appears to be Mr. Lewkowicz' signature on the last
16 page. I am not going to refer to any exhibits. If
17 counsel wants to, I assume he has them.

18 THE COURT: He is not offering it for the
19 truth of the contents. He is offering it only for the part
20 which says "I was told such and such."

21 Q Mr. Lewkowicz, will you take a look at your
22 affidavit, Page 23, and will you check and see if that is
23 a photocopy of your signature?

24 A Yes.

25 Q It is?

mpbr

Lewkowicz-cross

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1
2 A Yes.

3 Q I direct your attention to the first page,
4 where you say you have "I have just been informed by the
5 attorneys for Greeff."

6 A Where?

7 Q Right after your name, and being duly sworn
8 "I have just been informed by the attorneys for Greeff that
9 applying a copyright notice to the Camelot fabrics we are
10 selling has been held insufficient, " and so forth.

11 Now, sir, does that refresh your recollection
12 when you were informed about the differences?

13 A Well, it says so here, but I don't remember
14 if these were the dates.

15 Q This was April 23rd when you said you were
16 informed. Now, to go back to March 17th, in Paragraph 4
17 you say that the rubber stamp copyright notice is applied
18 to the tag and so on. That's Paragraph 4?

19 A Yes.

20 Q So since it was typed in Mr. Stoll's office,
21 am I correct, that at that date at least you had advised
22 Mr. Stoll the way you were doing it? Is that right?

23 A I don't know. I don't remember.

24 Q Again, Paragraph 3, where you say you have
25 been in strict accordance with the requirements of the

1 mpbr

Lewkowicz-cross

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2 license: Now, taking it in the context that it was
3 typed in Mr. Stoll's office, did Mr. Stoll tell you at that
4 date it wasn't in strict accordance with the license?

5 A I don't remember when he told me that, sir.

6 Q Okay.

7 Now, sir, with respect to the extension of the
8 license, I show you, sir, Defendant's Exhibit D, which
9 I don't believe you have been shown before, which purports
10 to be an amendment to the agreement of October 20th. It bears
11 the date of the 23rd of April, '76 and has what appears to
12 be your signature, and I ask you, sir, if you can identify
13 it as your signature.

14 A Yes, sir.

15 Q Thank you.

16 Now, sir, are you aware that under this
17 extension agreement dated April 23, 1976, which is
18 Defendant's Exhibit D, that a new provision appears with
19 respect to the copyright notice, and I quote "This notice
20 would be applied to each repeat of the pattern."

21 Do you remember that?

22 A Yes. Around that date we discussed it.

23 Q And were you told then that you would have to
24 place a copyright notice at every repeat?

25 A Yes.

1 mpbr

Lewkowicz-cross

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2 Q Now, sir, I note from your sales reports that
3 in the month of June of this year you sold approximately 9400
4 yards, or delivered a total of 9400 --

5 A The month of June? You have no way
6 of knowing how much I told in the month of June.

7 MR. GOLDBERG: Forgive me for a moment.

8 (Pause.)

9 Q Sir, I show you Defendant's Exhibit G and
10 direct your attention to the very last document, which is
11 dated June 29, '76, and states that Camelot sold and
12 shipped during the month of June '76 9,419 yards.

13 THE WITNESS: Your Honor, may I ask a question?
14 If the question of revealing the amounts or the yardages
15 in front of competition to -- of ours, that can make use of
16 that --

17 THE COURT: Where is your competition?

18 THE WITNESS: Sitting right there, repre-
19 sentatives of Malden. It is not fair that they should know
20 the amount of business that I have been doing --

21 THE COURT: This has been testified to so many
22 times during the course of this trial, and if you would
23 like to make objections you should have made it in the
24 beginning. I have gone along with every request to seal
25 this material and ordered that it be sealed. That's as much

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Lewkowicz-cross

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as I can do to help you.

MR. ROBERT STOLL: This is material that is under seal.

THE COURT: Of course, but this isn't the first time and the only time that this has been talked about, so I would suggest if you are going to refer to any figures, don't mention them by numbers, but show him on the document what you are talking about. Then what's your question?

MR. GOLDBERG: My question, your Honor, is whether every one of those yards were shipped with a copyright notice at every repeat.

THE COURT: All right. No matter how many you told, did you put --

THE WITNESS: That's right. We sold them with the repeat.

THE COURT: Don't talk to me as if I am a priest at a confessional. I am an umpire, and I don't have any conferences with anybody, nor does anybody tell me in secret.

He says those figures don't represent June as far as he understands.

MR. GOLDBERG: I am sorry, your Honor. It says June.

1 mpbr

Lewkowicz-cross

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2 THE COURT: I know what you say, and I know
3 what he say, and I am just telling you now, if he has any
4 question about that, look at the document yourself and see
5 what it says.

6 It says June the 29th. Now, this is a docu-
7 ment which was given to him by the lawyer to whom you gave
8 the information.

9 Q Without mentioning the name it says "Camelot
10 sold and shipped during the month of June 1976", sir.

11 THE WITNESS: Your Honor, this - I don't
12 know --

13 A This is a typographical error.

14 THE COURT: All right.

15 THE WITNESS: This is supposed to be May
16 31st.

17 THE COURT: Actually, he really doesn't care
18 because what he is talking about is whether or not you put
19 the repeat on there. That's what he is interested in.

20 THE WITNESS: Yes, we did.

21 Q On all the yardage shipped?

22 A On all the yardages.

23 Q Now, Mr. Lewkowicz, how did you do that?
24 What process did you use?

25 A We printed up a label with the Greeff --

1 mpbr

Lewkowicz-cross

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2 with the copyright notice on it, and as we put it on the
3 machine we put on those labels on every repeat.

4 Q Mr. Lewkowicz, in October of 1975, when you entered into the original license, did Greeff then, either
5 directly or through your attorney or any other way, instruct
6 you to put the copyright notice on in such a fashion, by
7 using labels or anything else?
8

9 A No.

10 Q Had they done so, would you have done it then?

11 A I don't know what I would have done.

12 Q I beg your pardon, sir?

13 A I don't know what I would have done at that
14 time.

15 Q Now, sir, my understanding is, and Exhibit D
16 states -- and I want you to correct me if it is wrong -- that
17 the license agreement was amended and extended on or about
18 April 23, 1976. Now, I want to tell you what question
19 I am going to ask, because I don't want you to be misled
20 in any way.

21 I note that your affidavit, which is Defendant's
22 Exhibit J for identification, which is 22 pages, is dated
23 that same day, sworn to April 23, 1976. Do you recall
24 making both those documents the same day?

25 A I don't recall.

1 mpbr

Lewkowicz-cross

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2 Q Mr. Lewkowicz, have you done everything --

3 MR. GOLDBERG: By the way, I would like to of-
4 fer this Exhibit J for identification in evidence.5 MR. ROBERT STOLL: May I suggest that it simply be
6 completed by adding the few exhibits --7 THE COURT: What's in the exhibits that you
8 want to bring to the Court's attention now? All he's
9 shown is that on the first page he said this. What has
10 that got to do with the exhibits?11 MR. ROBERT STOLL: He is not just offering
12 the first page. He is offering the entire document.13 THE COURT: Well, then object, and I will
14 allow only the first page. That's the only use that has been
15 made of it and that's the only relevance that has been made
16 of it.17 MR. GOLDBERG: The only reason for entering
18 the whole document is that the signature is on the last
19 page.20 THE COURT: All right, the signature and the
21 swearing, all right.

22 MR. ROBERT STOLL: I have no objection.

23 (Defendant's Exhibit J for identification
24 was received in evidence.)

25 Q Mr. Lewkowicz, this 22 page affidavit which is

1 mpbr

Lewkowicz-cross

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2 marked Defendant's Exhibit J: Was that also prepared
3 in Mr. Stoll's office?

4 A Yes.

5 Q Did you sign it in his office?

6 A Yes.

7 Q Were you then represented by counsel?

8 A No.

9 Q When you entered into the extension agreement
10 were you represented by counsel?

11 A No.

12 Q Mr. Lewkowicz, have you done everything within
13 your power to help Greeff maintain its copyright in this
14 matter?

15 A I did what I was supposed to do.

16 Q What you were told to do?

17 A What I was told to do. What I was supposed to
18 do. What I thought I was supposed to do.

19 Q Now, sir, did there come a time when you asked
20 your salesman Carl Golden to call Mr. Stoll and give him the
21 benefit of what he knew about alleged knock-offs in the
22 market?

23 A Yes.

24 Q Did there also come a time when you asked your
25 sales manager, Jeffry Haber, to call Mr. Stoll about

1 mpbr

Lewkowicz-cross

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2 similar information?

3 A Yes.

4 Q On the date, April 23, 1976, when you entered
5 into the extension of the license agreement and executed
6 the 22-page affidavit did you also tell one of the Stolls
7 that you would like Stoll & Stoll to represent your company
8 in some copyright matters that you had, not involving Greeff?

9 A In some copyright manners?

10 Q Some legal matters that you had not involving
11 Greeff. Did you ask them to be your lawyer?

12 A I asked them, I had some patterns to be
13 copyrighted, if they would handle it, and they told me no.

14 MR. GOLDBERG: May I have just a moment, your
15 Honor?

16 (Pause.)

17 Q Just one other question, Mr. Lewkowicz.
18 You have testified before that when the license agreement
19 was entered into in October of '75, that you had little
20 or no fabric actually in stock, that you may have had some
21 on order from the Belgian supplier. Do you recall, sir,
22 how much you had on order from Belgium?

23 A I don't recall, sir. On order or ship-
24 ments?

25 Q Well, let's just say for the moment on order.

1 mpbr

Lewkowicz-cross

2 A Well, I must have had a lot of goods on order.
3 I couldn't recall now, but a lot of goods.

4 Q How long do you order in advance from your
5 Belgian supplier?

6 A Oh, sometimes four or five months, two or three
7 months. It's a question of what color, a question of
8 what the production schedule is. It changes constantly.

9 MR. GOLDBERG: I have no further questions.

10 THE WITNESS: It changes constantly.

11 MR. GOLDBERG: Thank you, sir.

12 REDIRECT EXAMINATION

13 BY MR. ROBERT STOLL:

14 Q Mr. Lewkowicz, I believe you referred in your
15 testimony to a tag stapled to some of the goods that you
16 recognized as Belle goods?

17 A Yes.

18 Q If the tag weren't on the fabric, would you
19 be able to determine from the fabric itself --

20 A Please repeat it again.

21 Q If the tag, this ticket --

22 A Yes?

23 Q -- weren't on the fabric, would you be able to
24 determine when Belle sold that particular piece of fabric
25 or shipped it?

1 mpbr

Lewkowicz-redirect

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2 A No way.

3 Q Do you have any way of telling, Mr. Lewkowicz,
4 who attached this particular ticket to this particular
5 piece of fabric?

6 A That's hard to tell. I can't tell that, because
7 we aren't shipping out cut yardages. This seems to be a small
8 piece cut off a big piece, and who affixed that ticket to
9 this particular piece I don't know.

10 Q There is a second fabric specimen before you
11 that I believe had no ticket on it, and I ask whether you
12 are able to determine in any way when that was sold or
13 shipped by your company.

14 MR. GOLDBERG: Objection, your Honor.
15 Already asked and answered.

16 THE COURT: I think he said that about the
17 other piece, too, earlier in the testimony.

18 MR. GOLDBERG: That's right, your Honor.

19 Q Mr. Lewkowicz, you will recall that the
20 license agreement was signed and dated on October 20, 1975.
21 If there is any doubt I can show you a copy of the agreement.

22 A No. If that is what is on the copy, that's
23 what it is.

24 Q Just for reference in the record the two fabric
25 specimens that we are referring to are Defendant's Exhibit E

1 mpbr

Lewkowicz-redirect

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2 and Defendant's Exhibit F, as to the prior questions.

3 To repeat, the license agreement is dated
4 October 20, 1975. Did you ship any Camelot goods, the
5 fabric that we have here? Did you ship any Camelot goods
6 on October 20, 1975, the date of the entering into the
7 license agreement?

8 A I don't think so, and I can't -- on that day?

9 Q 3.

10 A well, if somebody could tell me day it was
11 of the week, if it has any significance to me.

12 Q I will be glad to refresh your recollection.

13 Do you recall where you were on October 20th,
14 the day that the agreement was negotiated and entered into?

15 A In New York, in your office.

16 Q You weren't at your own office?

17 A No.

18 Q Do you recall how long you were in New York?

19 A Oh, quite a few hours. Right until the evening.
20 I think we came home and went back to Newark by train to-
21 gether with Mr. Stoll. Practically all day.

22 Q With Mr. Popper you mean?

23 A Together with Mr. Popper, yes.

24 Q Does that refresh your recollection as to whether
25 you shipped any Camelot goods on that day?

1 mpbr

Lewkowicz-redirect

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2 A I wasn't in the place, so I can't tell for sure,
3 but they were at that time there was sort of like a
4 "stop everything. Let's see what's going to happen. Stop
5 everything."

6 It was a day before or a day after or that day.
7 I was not in the office and I can't tell.

8 Q Did you testify a little while ago that you
9 didn't ship any Camelot goods until you received the rubber
10 stamp copyright notice?

11 A Yes. After the date of signing of the con-
12 tract, we didn't ship any goods until we received the
13 notices -- the stamp.

14 Q Does that refresh your recollection as to
15 whether or not you shipped any goods on October 20th?

16 MR. GOLDBERG: Your Honor, that is the fourth time
17 that counsel is trying get an answer out of the witness.
18 He can't get the answer he wants, and he is keeping on
19 trying. I object.

20 THE COURT: Well, he is trying to refresh his
21 recollection. That's all. I will allow him to answer once
22 more.

23 A I can't tell. I know in that period of
24 time there was a stop order of all shipments of Camelot
25 until the results of the thing comes out. If it was

1 mpbr

Lewkowicz-redirect

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2 shipped a day before or two days before, I wouldn't know.

3 Q At the time you were given the rubber stamp
4 copyright notice, did you know whether or not it could be
5 applied directly to your fabric?

6 A No. I didn't know.

7 Q When did you learn whether or not the rubber
8 stamp copyright notice could be applied?

9 A We tried it out with various inks, and it
10 didn't work.

11 Q Did you advise Greeff or any of the repre-
12 sentatives, such as attorneys, that you could not apply it
13 on the fabric after trying it?

14 A I don't remember if I notified. Greeff, not,
15 but if I did the attorneys, I don't remember.

16 Q What did you do, after trying, that you could
17 not apply the copyright notice directly to the fabric?

18 A We put it on the tickets.

19 MR.GOLDBERG: Your Honor, there has been full
20 testimony. He said he put it on the tags and so forth.

21 THE COURT: Well, that's true, but I will
22 allow it to stand.

23 Q Do you recall advising Greeff or its attorneys
24 of applying the rubber stamp copyright notice to tickets
25 rather than directly to the fabric?

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Lewkowicz-redirect

123

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A I wouldn't remember.

Q I believe you testified that there did come a time that you were advised that the method you were using was not acceptable, and that you attempted to devise new means --

A That's right.

Q -- for applying the copyright notice.

A That's right.

Q Could you please describe your attempts to devise new means for applying the copyright notice?

MR. GOLDBERG: Your Honor, I object. There can't be any issue. It is obvious he did it, and the procedure he followed is not an issue in this case.

THE COURT: Well, you did bring this out on your examination. He was your witness at the time, and I will allow him to cross examine on it.

MR. GOLDBERG: I just asked him what he did, not the whole process, where he went and whom he tried to get labels from.

MR. ROBERT STOLL: Let me do it very briefly, then.

Q Did you find it was simple or difficult to find an alternative method?

A No. Very difficult.

Q Were you able to find an alternative method

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Lewkowicz-redirect

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1 quickly?

2 A Within a certain time. I don't remember if
3 it took me a week or what. And again I held up shipments
4 until I found it.
5

6 Q And you did ultimately find a new way of
7 applying the copyright notice?

8 A Yes.

9 (Pause.)

10 Q Mr. Lewkowicz, I believe you brought this
11 package into court with you today?

12 A Yes.

13 Q I ask you to describe what's in it and if you
14 have shown it to anyone including members of the firm of
15 Stoll & Stoll.

16 MR. GOLDBERG: Your Honor, I am going to object
17 to the belated attempt to get this in. This witness
18 has been through direct examination with Mr. Stoll, and he
19 didn't bring this in. This doesn't have anything to do
20 with anything I brought out.

21 They have had this all along, and apparently
22 they are going to spring this on us for some reason.

23 THE COURT: Well, I don't know what they have in
24 there, but even if there was a lapse of doing it in the
25 direct examination -- but I don't know if this has anything

1 mpbr

Lewkowicz-redirect

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2 to do with that. I imagine this has the new labels on it.

3 MR. STOLL: This witness has been made the
4 witness of the defendant.

5 THE COURT: Under the new rules I don't know
6 what sense that is. You are allowed to impeach anybody,
7 even your own mother. We are seeking the truth. We don't
8 care where it comes from.

9 Q Mr. Lewkowicz, will you remove whatever is in
10 this package and show it to the Court and we will certainly
11 offer it in evidence. Do you need any help?

12 A No.

13 Q Would you please describe what you have just
14 removed from the page?

15 A Well, this is the design "Camelot", with a
16 ticket on it with the Greeff copyright, and these tags at
17 every repeat, continuous repeat.

18 MR. ROBERT STOLL: I ask that this be entered
19 as Plaintiff's Exhibit 11.

20 VOIR DIRE EXAMINATION

21 BY MR. GOLDBERG:

22 Q Mr. Lewkowicz, haven't you testified that you
23 used adhesive labels --

24 MR. ROBERT STOLL: Excuse me, I am offering this

25 THE COURT: This is an examination on the

1 mpbr

2 voir dire. He wants to find out whether he is going to
3 object.

4 Q This is adhesive?

5 A Yes.

6 Q You also have staples on here. Did you use that
7 all the time?

8 A No, just sometimes. That was for Scotch Guard
9 reasons.

10 Q Will you explain that?

11 A For additional production.

12 Q Is Scotch Guarding a wet process?

13 A Not necessarily.

14 Q Was it your concern that the Scotch Guarding
15 would take the labels off?

16 A No, not necessarily.

17 Q Is that why you used the staples?

18 A Well, we didn't know whether to take the tags
19 off or not.

20 (Plaintiff's Exhibit 11 for identificat-on
21 was received in evidence.)

22 BY MR. ROBERT STOLL (Continued):

23 Q Mr. Lewkowicz, referring to Plaintiff's
24 Exhibit 11 and the adhesive labels on there with the
25 Greeff copyright notice, I ask you whether these are

1 mpbr Lewkowicz-redirect 127
2 adhesive labels which you found in the store or how did
3 you locate these labels?

4 A I have located it after asking some dealers
5 and packaging suppliers, and they found this for me, and
6 they have them printed for me.

7 Q What was your concern in selecting these
8 labels over others that were on the market?

9 A I figured these were better than the others.
10 The others may not stick as good as these.

11 Q Is this the manner in which all Camelot
12 fabric or the licensed fabric is sold and shipped by
13 Belle?

14 A That's right.

15 Q Did anyone at Greeff or its attorneys ever
16 advise you that a single copyright notice for an entire
17 bolt of cloth is acceptable?

18 MR. GOLDBERG: Objection, your Honor. The
19 witness has already testified at length about this.
20 There's already an affidavit in evidence which Mr. Stoll
21 prepared which says it was in accordance with the
22 agreement. How can we have any more on the same issue?

23 THE COURT: Well, this is actually recross and
24 redirect, and I don't know that this is recross at this
25 point.

1 mpbr

Lewkowicz-redirect

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2 It seems to me that this is part of your
3 case. I think you have covered it.

4 Q Do you sell the Camelot fabric in cut pieces?

5 MR. GOLDBERG: Objection, your Honor. This is
6 not appropriate recross at all. This is part of the direct
7 case. Now, they have had a chance to ask all of this.

8 THE COURT: It seems to me that's the fact,
9 and as a matter of fact, he did testify to some degree to
10 it.

11 MR. ROBERT STOLL: I don't believe he did, your
12 Honor, and I will ask one question.

13 Q Does Belle sell the fabric in anything less
14 than full bolt rolls?

15 A No.

16 Q Or quantities?

17 A We sell only full rolls.

18 Q Do you sell the Camelot fabric to stores for
19 resale or to users of the fabric?

20 A To manufacturers. Furniture manufacturers.

21 Q Furniture manufacturers. That's for their
22 own use?

23 MR. GOLDBERG: Your Honor, I object. This is go-
24 ing over the same ground.

25 THE COURT: Look, I have another hearing

1 mpbr

Lewkowicz-redirect

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2 waiting. If you are going to go along requirgitating
3 everything, I would sit here and go along with it only a
4 little longer.

5 MR. ROBERT STOLL: Your Honor, it was on cross
6 examination that much of this came out.

7 THE COURT: Well, I am not going to allow it,
8 so pick up something new that has been picked up as redirect
9 by the other side, and I will allow it, but I am not going
10 to allow requirgitation of the case in principal.

11 MR. ROBERT STOLL: Your Honor, there was one exhibit
12 it to the April 23rd affidavit of Mr. Lewkowicz that has
13 been entered as Defendant's Exhibit J. I would like to
14 ask the witness to identify that to assist --

15 Q Mr. Lewkowicz, I hand you a copy of a letter
16 addressed to you and ask you if you can identify this.

17 A Yes. I remember this letter.

18 Q Could you describe it, please.

19 A Hmm?

20 THE COURT: Sustained. It's not in evidence.

21 MR. GOLDBERG: I have no objection to it going
22 into evidence, your Honor.

23 THE COURT: All right, mark it.

24 (Plaintiff's Exhibit 12 was received in
25 evidence.)

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Lewkowicz-redire

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MR. ROBERT STOLL: I state for the record that Plaintiff's Exhibit 12 is described in the affidavit, Defendant's Exhibit J, as Exhibit D to that affidavit, and I ask you to identify or describe Exhibit 12.

MR. GOLDBERG: It speaks for itself, your Honor.

THE COURT: Yes, it is in evidence, and it speaks for itself. I can read English.

Q Mr. Lewkowicz, at a deposition given in this case by Mr. Milton Glasser, Mr. Glasser was testifying concerning the first sample of a Belle fabric that the defendant had received. It is not a specimen which has been introduced in any of the exhibits. We understand from the defendant that that specimen is no longer available to the defendant.

Mr. Glasser testified, beginning at Page 9 of his transcript --

MR. GOLDBERG: Your Honor, I object to this procedure of telling a witness what another witness has testified to and asking him about it. It seems altogether extraordinary.

Why not just ask the witness what he knows about the event, and let's get on with it.

THE COURT: I find it defective, myself.

1 mpbr

Lewkowicz-redirect

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2 He hasn't adopted it or contradicted it. I don't know
3 what he is saying about it.

4 Q I then ask you, Mr. Lewkowicz, if someone
5 obtained a specimen of your Camelot fabric or had it on hand
6 -- I should not say "obtained it" -- had it on hand on
7 October 21, 1975, the date following the license agreement,
8 could you state the date when such a specimen would have
9 been shipped by Belle after discussion of the license agree-
10 ment the day before?

11 MR. GOLDBERG: Objection, your Honor. The
12 witness has already testified that he doesn't know if or
13 whether his company shipped any goods on the day the agree-
14 ment was entered into or the next day or the day before.

15 THE WITNESS: I didn't say the next day.

16 THE COURT: I will allow him to answer it.

17 Overruled.

18 A On that day -- say it again, the question.
19 Repeat it.

20 Q If someone were to have a specimen of the Belle
21 Camelot fabric on October 21, 1975, the day after the
22 license agreement was entered into, could you state whether
23 that specimen would have been shipped by Belle after the
24 license agreement was entered into?

25 A Without the Greeff copyright?

mpbr

Lewkowicz-redirect

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2 Q Under any circumstances,

3 A No. From the 21st -- unless it was delivered
4 by hand or unless somebody broke into our place and took it
5 out during the night.

6 Q Did you deliver any specimens of Camelot fabric,
7 by hand or any other means or method of delivery, to
8 the defendant, Malden Industries?

9 A No.

10 (Pause.)

11 Q If someone had a specimen of your Camelot
12 fabric on hand on November 10, 1975, considering that the
13 license agreement was entered into on October 20th, could
14 you state whether Belle sold or shipped that fabric after
15 entering into the license agreement on October 20th?

16 A Without copyright notice?

17 Q Either way.

18 A They could have it there, if it was shipped
19 before that.

20 Q To your knowledge, is there sufficient time
21 between entry of the license agreement on October 20th
22 and the date November 10th of the same year -- is there
23 sufficient time for Belle to have shipped goods bearing the
24 copyright notice -- and this, of course, was after you
25 received the rubber stamp -- you didn't ship before that,

1 mpbr Lewkowicz-redirect-recross 133

2 I understood -- and have someone receive it by November 10th?

3 A Possibly.

4 Q Do you recall now with our discussions when
5 you first shipped Camelot Fabric following the execution
6 of the license agreement?

7 A The exact date I don't know, no.

8 MR. ROBERT STOLL: That is all, your Honor.

9 RECROSS EXAMINATION

10 BY MR. GOLDBERG:

11 Q Mr. Lewkowicz, are you familiar with the process
12 known as heat transfer paper?

13 A No.

14 Q You aren't?

15 A No.

16 Q Did you ever make any attempt to use heat trans-
17 fer paper to affix a copyright notice to the fabric?

18 MR. ROBERT STOLL: Objection, your Honor.

19 The witness has stated he didn't, and this goes away beyond
20 what was brought out on redirect

21 THE COURT: Overruled.

22 Q (Continuing) The question is, did you make
23 any attempt to use heat transfer paper to imprint a copyright
24 notice directly onto your fabric?

25 A No.

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Lewkowicz-recross

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MR. GOLDBERG: No further questions.

THE COURT: All right. You may step down.

MR. POPPER: Your Honor, may this witness be excused? He is also under subpoena by the defendant, but I suppose the examination --

THE COURT: I think you have had your full examination already.

MR. POPPER: Yes; your Honor.

THE COURT: Mr. Goldberg --

MR. GOLDBERG: Yes.

THE COURT: There's no objection to his leaving.
(Witness excused.)

MR. ROBERT STOLL: If it please the Court, your Honor was concerned, there's another matter waiting.

THE COURT: There is. I have an injunction proceeding, preliminary injunction.

MR. ROBERT STOLL: Would you want me to continue?

THE COURT: How much more time do you need?

MR. ROBERT STOLL: We have portions of a deposition to read into the record of a witness who is not present.

THE COURT: How many other witnesses?

MR. ROBERT STOLL: One more witness who

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2 hasn't yet arrived. I was inquiring. He was called
3 to come in.

4 THE COURT: Well, I will recess this case
5 until that witness comes in. Maybe I can do something
6 with that other case in the meantime.

7 MR. GOLDBERG: Your Honor, the only problem
8 we have is Mr. Popper -- well, I guess if he's not going to
9 call him, we will just have to wait.

10 I am sorry, Mr. Popper.

11 THE COURT: Well, we probably can take his
12 testimony today, so he won't have to come back.

13 MR. ROBERT STOLL: I would not object to
14 having Mr. Popper called now, out of order.

15 THE COURT: Well, we will get him out of here
16 today, anyway. Let's see what we can do with this other
17 matter.

18 How long is Mr. Popper's testimony going to be?

19 MR. GOLDBERG: I should estimate ten minutes,
20 but I am no longer willing to estimate the amount of cross
21 examination.

22 (Recess.)
23
24
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Chwatt-direct

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R I C H A R D C H W A T T, called as a witness by
the plaintiff, having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. ROBERT STOLL:

Q Mr. Chwatt, what is your residence address?

A 71 Flamingo Road, Roslyn, New York.

Q Mr. Chwatt, will you be good enough to state
your educational background?

A I am a graduate of the Philadelphia College
of Textile Sciences. I have a bachelor's degree in chemistry,
dyeing and finishing.

Q Is that a full, four-year college course?

A Yes, it is.

Q Do you have knowledge of the fabric industry?

A Yes, I do.

Q Could you please describe your background in
the fabric industry which would give you such knowledge?

A I was formerly the president of a dyeing and
finishing corporation in New York City; presently the
president of a double-knit manufacturing company in
Farmingdale, Long Island.

Q When you say a double-knit manufacturing
company, that is a fabric manufacturing company?

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Chwatt-direct

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A That is correct.

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Q How extensive, Mr. Chwatt, is your knowledge of the means used to identify bolts of fabric?

5

6

7

MR. GOLDBERG: Objection, your Honor. We aren't dealing here with double-knits. We are dealing with upholstery fabrics using heavy woven fabrics.

8

9

Q I will ask you, what is your familiarity with the upholstered fabric industry?

10

11

12

A We supply manufacturers of sportswear, garments, dresses, upholstery and any other type of fabric utilizers, albeit not confined to manufacturing of garments.

13

14

Q You do supply fabric: you are manufacturers of fabric for the upholstered furniture industry?

15

16

17

18

A That is correct, and prior to our direct manufacturing for that trade, we were in the dyeing and finishing business related to upholstery, automobiles and so forth.

19

20

21

Q I then repeat the question: How extensive is your knowledge of the means used to identify bolts of upholstery fabric?

22

23

24

25

MR. GOLDBERG: Objection, again, your Honor. There is no testimony that this witness has even been inside an upholstery manufacturer, let alone that he has any specific knowledge in the area.

1 mpbr

Chwatt-direct

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2 MR. ROBERT STOLL: On the contrary, he has
3 testified he is president of such a company.

4 THE COURT: He seemed to limit it to double-knit.
5 VOIR DIRE EXAMINATION

6 BY MR. GOLDBERG:

7 Q What is the name of your company?

8 A Jaimie Industries.

9 Q Is that part of another company?

10 A No, it is a public corporation.

11 Q And you say you sell double-knits to upholstery
12 manufacturers?

13 A That is correct.

14 Q What portion would you say of your double-knits
15 goes to upholstery?

16 A A minimal portion. I think my earlier testimony
17 was that in the dyeing and finishing business we finish
18 fabrics for all trades, not any particular trade.

19 Q But I am speaking of your present business,
20 Jaimie, now.

21 A That is correct.

22 Q Would you say you sell to two upholstery
23 manufacturers?

24 A I can't give you that information. I am not
25 involved directly in sales. We don't specify for any

1 mpbr

Chwatt-direct

2 particular trade any particular requirement.

3 Q Are you aware of any upholstery manufacturer
4 that purchases any of your fabrics today?

5 A Yes.

6 Q Who are those?

7 A Schuman & Brasch. There are a multitude of
8 firms that use our ADT Interiors. There are many companies
9 that buy our goods for upholstery utilization.

10 Q Fabric companies or --

11 A Both. Who will buy it for ultimate utilization
12 in the furniture industry. But may I say that we do not
13 specify in any particular field. We don't do any differ-
14 ent for a garment manufacturer and other manufacturers.
15 Whether we work for a converter in our business --

16 Q I understand that. Have you ever worked in a
17 factory that makes furniture, upholstered furniture?

18 A Have I ever worked in one?

19 Q Yes, sir.

20 A No, I have not.

21 Q Have you ever owned one?

22 A No, sir.

23 MR. GOLDBERG: Your Honor, I think this
24 witness is not qualified --

25 THE COURT: Have you ever testified as an expert

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Chwatt-direct

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1 in any court of record?

2 THE WITNESS: As an expert witness?

3 THE COURT: Yes.

4 THE WITNESS: No, your Honor. I have not.

5 THE COURT: I don't think he is really
6 qualified in the area that we are talking about.

7 MR. ROBERT STOLL: If your Honor please, my
8 question that was objected to is how extensive is his knowl-
9 edge of the means used to identify bolts of fabric,
10 and I think that would help clarify the matter. That is
11 not yet the testimony that I want but certainly it is
12 relevant to our examination --

13 THE COURT: Well, you can ask him anything you
14 want, but at this point I don't find him to be an expert in
15 the area in which you are seeking to establish him for
16 the purpose of this trial.

17 MR. ROBERT STOLL: May I ask him a
18 question --

19 THE COURT: Ask him any question. I will rule
20 on it.

21 BY MR. ROBERT STOLL (Continuing):

22 Q How extensive is your knowledge of means used
23 to identify upholstery fabric?

24 MR. GOLDBERG: Your Honor, it is hard to object,
25

1 mpbr

Chwatt-direct

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2 because I don't know what he means: By the mill, by
3 the converter, by the dealer, by the manufacturer. There
4 are any number of steps in which a bolt is handled.
5 Tickets get on and off.

6 THE COURT: Well, you establish that.

7 THE WITNESS: May I help, your Honor?

8 THE COURT: No. Let him ask the question.

9 Q Are you familiar with the means used by
10 your own company for identifying bolts of fabric used
11 in the upholstery furniture trade?

12 A Yes, I am. In addition to which, Mr. Stoll --

13 THE COURT: You are interrupting. Just answer
14 questions. You are just a witness here.

15 Q What other knowledge would you have of the
16 means used to identify bolts of fabric in the upholstered
17 furniture industry?

18 MR. GOLDBERG: By whom?

19 THE COURT: Read the question.

20 (Question read.)

21 MR. GOLDBERG: Your Honor, I think the question
22 has to be at some specific stage, who is going to identify
23 them at some stage? Otherwise the witness could just get
24 it from the mill that initially manufacturers require
25 fabrics to whoever finishes it --

1 mpbr

Chwatt-direct

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2 THE COURT: Well, I will allow him to give
3 his experience in this area.

4 A I have been personally involved in all phases of
5 that area, from yarn manufacturing. We had a spinning mill
6 in Providence, Rhode Island. We had a dyeing and finishing
7 operation in Brooklyn, New York, which dyes and finished
8 fabrics for all trades, including the upholstery trade,
9 the thread trade, the knitted outerwear trade, the sports-
10 wear trade, the men's slacks and suit trade. In all
11 phases of dyeing and finishing as a contract commission
12 operation, not for any specific field or manufacturer.

13 MR. GOLDBERG: Your Honor, we aren't dealing
14 with dyeing and finishing here.

15 THE COURT: I'm not saying that we are.

16 A I am not in the manufacturing of fabrics, per
17 se, double-knits, shipping to manufacturers of garments,
18 upholstery and so forth.

19 Q Are you familiar with the means used for
20 identifying bolts of fabrics?

21 A Yes, I am.

22 Q And are you also familiar with that from the
23 time it leaves a fabric manufacturer to the time it is used
24 by an upholstered furniture manufacturer.

25 MR. GOLDBERG: Objection. The witness has

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Chwatt-direct

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testified he never worked for a furniture manufacturer.

THE COURT: Well, he doesn't necessarily have to have worked there in order to gain knowledge. Overruled.

(Question read.)

A Yes, I am?

Q And how do you have such knowledge?

A I am sorry --

Q How do you have such knowledge?

A By our company shipping fabrics to such manufacturers.

Q How are you familiar with the means by which an upholstered furniture manufacturer would identify its bolts of fabric received from your company?

A How am I --

Q How would you be familiar with the means by which an upholstered furniture manufacturer would identify bolts of fabric which it received from your company?

A By the way we are directed to ship such fabrics to such manufacturers.

MR. GOLDBERG: Your Honor, I will then object again to his being established as an expert in this field. Obviously his knowledge is based on hearsay of what his customers tell him.

1 mpbr

Chwatt-direct

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2 THE COURT: He hasn't asked him an opinion
3 question yet, so there's nothing before me to rule on.

4 Q Do you ever get complaints or returns of fabric
5 from the upholstery fabric manufacturers?

6 A Yes; we do.

7 Q Does that in any way add to your knowledge of the
8 practices of upholstered furniture manufacturers in identify-
9 ing the fabric?

10 A Yes; we would.

11 Q How would that add to your knowledge?

12 A By the representations -- by the dyes being
13 represented by a particular bolt of fabric that for one
14 reason or another has been damaged or that there is a com-
15 plaint about. The idea of the particular bolt of fabric --
16 it would have to have some means of identification.

17 Q And that would be after the fabric is returned
18 to the fabric manufacturer by the upholstered furniture
19 manufacture?

20 A That is correct.

21 Q Have you ever inspected bolts of fabric on
22 complaint or otherwise?

23 A Yes, I have.

24 Q As they are actually on the premises of an
25 upholstered furniture manufacturer?

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Chwatt-direct

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2 A Yes; I have.

3 MR. ROBERT STOLL: May I then proceed, your
4 Honor, with the opinion questions?5 MR. GOLDBERG: Your Honor, we will certainly
6 object to that. This witness has already testified that
7 he has maybe a few upholstered furniture customers, so
8 that we aren't dealing with a representative sampling.
9 In this city, which is the garment and fabric center of the
10 world, or certainly this country, there are any number of
11 people who deal directly with the upholstered furniture
12 trade who can testify. There are people who run such
13 plants, the actual furniture factories who could testify.
14 Why should the Court have to hear this witness who is in
15 the double-knit trade, which is used for ladies' sportswear
16 and that kind of everything?17 I don't think it is necessary to ask the
18 witness. Obviously his experience with upholstered fabrics
19 is minimal.20 No, if we were somewhere over in Uganda,
21 and nobody knew anything about this except this gentleman,
22 perhaps his testimony might be acceptable, but not in
23 New York City, where there are a million people who know more
24 about it than he does.

25 THE COURT: Yes. I find he is not properly

1 mpbr

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2 qualified in this expertise you are seeking. It is a
3 minimal contact he has with maybe one or two people he deals
4 with.

5 I would sustain the objection.

6 MR. ROBERT STOLL: May I ask the witness
7 whether indeed he has contact with upholstered furniture
8 manufacturers?

9 THE COURT: You did. He mentioned one name, and
10 that's as far as he went.

11 Q Was that as far as it went, Mr. Witness?

12 A May I say this: That the attorney indicated
13 that double-knit fabrics are used for sportswear or
14 garment manufacturing, and may I say that you are absolutely
15 incorrect, and your knowledge is limited to law, because
16 double-knit fabrics are used for draperies, upholstery, auto-
17 mobile upholstery and other fabrics where stress is a
18 criterion, where woven fabrics --

19 MR. GOLDBERG: Your Honor, I object. This is
20 volunteered.

21 THE COURT: Yes. Suppose you develop it.

22 Q Could you please explain to the Court the
23 manner in which your fabrics are used in upholsterers'
24 furniture?

25 A Our fabrics are used in numerous phases of

1 mpbr

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2 manufacturing, including but not limited to upholstery,
3 garment manufacturing, draperies, anything that requires
4 stress.

5 A woven fabric is a rigid fabric. It doesn't
6 give to any stress. General Motors today --

7 MR. GOLDBERG: Your Honor, I am going to object
8 to this disquisition of the witness. He was asked a simple
9 question.

10 THE COURT: Well, you see these exhibits here in
11 court. Do you deal in that kind of material?
12 Is this the kind of thing you are talking about?

13 THE WITNESS: This is a woven piece of
14 fabric, your Honor.

15 THE COURT: You aren't talking about that?

16 THE WITNESS: No.

17 THE COURT: You see that other one over there?
18 Is that the kind of material you deal with?

19 What did you show him?

20 MR. GOLDBERG: This was Defendant's Exhibit F.
21 I am now going to show him Defendant's Exhibit E.

22 THE COURT: Here is another piece. Did you
23 at any time deal with that kind of material?

24 THE WITNESS: Yes. We finished fabrics of this
25 nature, yes. We don't at this point -- our company now

1 mpbr

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2 doesn't manufacture these type of fabrics.

3 THE COURT: Well, what experience have you had in
4 this type of material that you now handling?

5 THE COURT: Other than finishing this type of
6 fabrics.

7 Q Does finishing imply manufacturing?

8 A Finish implies treating with a resin or
9 napping or shearing, with a device to raise hairs or lower
10 hairs.

11 Q And once you have finished it do you then ship
12 it to upholstery manufacturers?

13 A Right.

14 THE COURT: How long ago?

15 THE WITNESS: Seven to ten years ago.

16 Q Did your course of study at the Philadelphia
17 Textile Institute include studies in this phase that we are
18 cussing now: Fabrics of this nature?

19 A Yes.

20 MR. GOLDBERG: Objection, your Honor. He is
21 trying to use him as a witness with respect to the practices
22 of manufacturers of upholstery furniture as to piece
23 tickets and so forth. I can't conceive that he learned
24 about it in college, or if he did perhaps he would better
25 tell us the name of the course.

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THE COURT: Well, it doesn't satisfy the burden of showing that he is an expert in this particular area. Seven or ten years ago he dealt in this area. This is a case that happened a year or two ago. We don't know if he knows the practices in the industry now.

MR. ROBERT STOLL: May I ask the witness if there is any differences in the use of piece tickets in the areas to which has alluded.

THE WITNESS: Not that I know of.

Q Do you state that of your own knowledge?

A Yes, I do.

Q Are you familiar with the present use of piece tickets to identify fabric in the upholstered furniture industry?

MR. GOLDBERG: Objection, your Honor. We can't have a witness who can testify about Industry A, and he assumes that Industry B is the same.

THE COURT: I will allow the question.

(Question read.)

A Yes, I believe I am.

MR. ROBERT STOLL: May I proceed, your Honor, with this witness?

THE COURT: I still don't find he is an expert. I think he has a minimal knowledge in this area,

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2 and he has knowledge acquired when he was a student and so
3 forth, and he is probably familiar with some practice, but
4 I don't see how he can testify as to what happened to these
5 particular bolts of cloth last year, 1975.

6 MR. ROBERT STOLL: The point is, your Honor, we
7 have had testimony in this particular industry but from people
8 from whom it may be suggested have a connection with the
9 plaintiff. We have had such testimony from a number of
10 witnesses, including Mr. Lewkowicz.

11 THE COURT: I am aware of that, and I know that
12 you are trying to bolster your case with this kind of
13 testimony. But it seems to me you should have gotten
14 an expert in the field rather than someone in a related
15 area, who has minimal contact with this.

16 MR. ROBERT STOLL: We tried to get an individual
17 without a contact whatsoever to either of the parties
18 in this case or to Belle, the third company.

19 THE COURT: Well, I have a judgment to make
20 in this area, and up to this point I am not satisfied
21 that he is an expert in this area. He knows fabrics and
22 so forth, but we are dealing with a specific problem here,
23 and giving an opinion based upon his background I don't
24 think would be fair at this point.

25 MR. SAMUEL STOLL: Your Honor, there is no

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evidence that the practice in the upholstered furniture industry is different from any other industry.

THE COURT: But the defendant doesn't have to show that. It is not the obligation of the defendant to set up negatives.

MR. SAMUEL STOLL: This witness has testified that there is no differences.

THE COURT: Oh, he hasn't. He says he hasn't been in it for ten years, for example. So that the basis of the fact is that he got back a bolt of cloth from some manufacturer who uses it in upholstery -- how does that show a practice in the industry?

MR. SAMUEL STOLL: I think he should be permitted to testify to the use of piece tickets in the fields that he has familiarity with, and if the defendant deals there is a difference in --

THE COURT: Well, I won't use a vulgar expression to characterize that. However, you may proceed.

MR. ROBERT STOLL: Your Honor has ruled, and there is no need for further questions.

THE COURT: You don't want to cross examine him?

MR. GOLDBERG: No, your Honor.

(Witness excused.)

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2 THE COURT: Now your deposition of whom?

3 MR. ROBERT STOLL: I think I will be --

4 MR. SAMUEL STOLL: Your Honor, we would like
5 to help Mr. Popper out of here as soon as possible.

6 THE COURT: All right. Put him on.

7 MR. ROBERT STOLL: Well, it was the defend-
8 ant who wanted to put him on.

9 THE COURT: Well, we will let the defendant take
10 him out of order, if it becomes necessary to put on a
11 defense case.

12 N O R M A N N. P O P P E R, called as a witness by
13 the defendant, having been first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. GOLDBERG:

17 Q Mr. Popper, are you a member of the Bar of the
18 State of New Jersey?

19 A I am.

20 Q You are also a member, sir, of the Bar of this
21 court?

22 A Yes, I am, since 1973.

23 Q Did there come a time, sir, when you were
24 retained by Belle Fabrics, Inc. to represent them in a
25 lawsuit which had been brought against them by Greeff Fabrics?

1 mpbr Popper-direct 153

2 A Yes. Immediately prior to October 14, 1975.

3 Q And, sir, in that connection, did you conduct

4 the negotiations for Belle with Greeff's attorneys which

5 resulted in a settlement?

6 A I did.

7 Q And as part of that settlement, was a license

8 agreement negotiated?

9 A Yes.

10 Q Did that license agreement, sir, permit Belle

11 Fabrics to sell, promote and so forth, fabric containing

12 Greeff's "Contemplation" design?

13 A I am a little bit at a loss as to Greeff's

14 "Contemplation" design, but I do identify the license as cover

15 ing Belle's "Camelot" design. I believe it is the same.

16 MR. GOLDBERG: Mr. Stoll, will you stipulate

17 that they are the same?

18 MR. ROBERT STOLL: I certainly shall.

19 THE COURT: Well, there's evidence in the case.

20 One witness testified they are the same. It was the man

21 himself.

22 MR. GOLDBERG: Yes, your Honor. I wasn't sure.

23 THE COURT: All right.

24 Q Now, Mr. Popper, in that connection, did the

25 license agreement provide for Belle to apply a copyright

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Popper-direct

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notice to the fabric it would sell under the license?

A It did.

Q Did you have discussions with the attorneys for Greeff during these negotiations regarding the use of a copyright notice?

A Yes.

Q During that time, sir, did the attorneys for Greeff or anybody else on behalf of Greeff discuss placement of the copyright notice?

A Yes.

Q And what was that discussion, sir?

A As embodied in the contract, the copyright notice was to be placed on the fabric. I am looking at Clause 4 of the agreement.

Q Yes, sir. And was there a discussion with you or were there instructions that the notices were to be repeated on the fabric?

MR. ROBERT STOLL: Objection, by whom?

THE COURT: Rephrase the question.

Q We are talking about the meeting with the attorneys for Greeff, Stoll & Stoll. Were you given instructions at that meeting by them or anyone else with respect to asking Belle to place the notice on every repeat of the design?

1 mpbr

Popper-direct

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2 A Not in those terms.

3 Q Well, in some other terms, sir?

4 A The discussions took the form of requiring
5 the copyright notice to be on the fabric or reproductions of
6 the copyright design in the fabric, and that language having
7 been discussed, was specifically embodied in Clause 4 of the
8 agreement.

9 Q Mr. Popper, I read to you a statement that you
10 made at your deposition and ask you if you recall having
11 made that.

12 MR. GOLDBERG: I am reading from Page 8,
13 Mr. Stoll.

14 MR. ROBERT STOLL: May I suggest that a copy of
15 the deposition be given to the witness, since this is not
16 cross examination and we aren't trying to impeach the wit-
17 ness but to aid his testimony.

18 MR. GOLDBERG: I will be happy to.

19 Q (Continuing) "A I would have remembered
20 any particular specification as to the exact manner of affix-
21 ing a copyright notice because looking in the back of my
22 mind was a lacecase that I have been involved with years
23 before, when questions arose as to repeats and things like
24 that, and nothing was specified other than the copyright
25 notice should be applied."

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Popper-direct

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Do you recall making that statement, sir?

A Yes. I call your attention to the use of the word "particular".

Q Yes.

A There was nothing particular other than to say that the notice must be applied to the fabric or reproductions.

Q Were you told that Greeff's attorneys relied on you personally to supervise the manner in which Belle applied the copyright notice?

A I was not told that.

Q Were you told they relied on you to advise Belle with respect to the details of placement of the copyright notice?

THE WITNESS: May I have that question repeated, Mr. Reporter.

(Question read.)

A Emphatically, no.

Q Sir, at your deposition, on Page 15 you made the statement "I believe that he" -- referring to Mr. Lewkowicz -- "has most certainly lived up to the agreement to affix a copyright notice and give adequate monthly reports."

Is that still your opinion, sir?

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Popper-direct

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A And what?

Q And to give accurate monthly reports.

A Yes, I believe that he lived up to the agreement. He placed the copyright notice on the fabric and gave monthly reports as to the exact yardage sold and paid the royalty.

Q You are speaking now of the copyright notice that was affixed to the hang tag?

A I never understood there were going to be any hang tags applied. To me, a hang tag is a tag that hangs. It is a tag on a cord, and --

Q Are you referring now to a piece ticket instead? I don't mean to quibble over those words. If you prefer for me to use "piece ticket", I will use that. I am just saying, you aren't referring now, Mr. Popper, when you say they complied with the agreement, to the adhesive labels they put on after the extension.

A No. I am not referring to that at all, because there was nothing specifically and precisely contemplated at the time we negotiated the settlement. If I may explain my attitude --

Q No. Can I just go on?

MR. SAMUEL STOLL: Your Honor, I think the witness should be allowed to answer the question.

1 mpbr

Popper-direct

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2 THE COURT: No, no. He can only answer a
3 question that is put to him. He is not to volunteer any-
4 thing.

5 Q Mr. Popper, on the plaintiff Greeff's motion
6 for a preliminary injunction Greeff's attorneys in a brief
7 made the following statement, and I quote:

8 "Belle's use of the copyright notice is rigorous
9 and in accordance with the requirements of the limited li-
10 cense."

11 Are you in agreement with that statement,
12 Mr. Popper?

13 A I can't say that I agree or disagree. I don't
14 know specifically what counsel may have had in mind when
15 they made that statement in brief.

16 MR. GOLDBERG: I have no further questions of
17 Mr. Popper.

18 CROSS EXAMINATION

19 BY MR. ROBERT STOLL:

20 Q Mr. Popper, at your deposition you were asked the
21 following question and gave the following answer, and this
22 appears on Page 7 of the transcript.

23 "Q Do you recall any discussion as to preserva-
24 tion of Greeff's copyright?"

25 That is the question, and it was referring, of

1 mpbr

Popper-cross

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2 course, to the negotiations for the Belle license.

3 A Yes. I do recall.

4 Q Very good, sir.

5 Will you be good enough to give your recol-
6 lection in that regard?7 A It was a constant, recurring theme that Greeff,
8 the plaintiff, desired to protect its copyright, which they
9 seemed to believe was a very valuable one, and this dis-
10 cussion was brought up over and over again, and if he
11 didn't grant licenses, and I was importuning for a license
12 for my client. But this came up over and over again.
13 Greeff is intimately desirous of protecting its copyright,
14 and --15 Q Do you believe that the language of the
16 license agreement reflects Greeff's concern in regard to
17 protecting the copyright notice?18 MR. GOLDBERG: Objection. How can he possibly
19 know that?20 THE COURT: Well, it calls for the mental
21 operation of someone else, in any event. I would sustain
22 the objection.23 Q Do you know whether the language in Paragraph 4
24 of the license agreement with respect to application of the
25 copyright notice was intended to imply the inclusion of the

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Popper-cross

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statutory requirements for a copyright notice?

MR. GOLDBERG: Objection again. It calls for the working of the plaintiff's mind.

MR. ROBERT STOLL: I asked whether it was his understanding.

THE COURT: Well, you didn't say that. The question wasn't actually that. Reword it.

Q Is it your understanding of Paragraph 4 of the license agreement that the language regarding copyright notice is intended to refer to the statutory copyright notice required by the copyright act?

A Insofar as I understand your question, the language of Paragraph 4 was intended to place an obligation upon the licensee to apply a statutory copyright notice.

Q Referring again to Paragraph 4 of the license agreement -- and the license is Defendant's Exhibit C -- I believe you have a copy before you -- you were referring, were you not, to the first sentence of Paragraph 4, which provides for the copyright notice?

A Yes. In a manner of speaking, the first sentence.

Q Were you also referring to the last sentence of Paragraph 4 --

MR. GOLDBERG: Objection, your Honor. The

1 mpbr Popper-cross 161
2 witness didn't say he was referring to anything. Why not
3 ask what he was referring to instead of leading him and
4 telling him what he was referring to?

5 MR. ROBERT STOLL: This is cross examination.
6 The question has been asked halfway.

7 THE COURT: I will allow it. Overruled.

8 Q May I ask, Mr. Popper, whether you were also re-
9 ferring to the last sentence of Paragraph 4, which
10 continues from Page 2 to Page 5 of the agreement?

11 A Very definitely, respecting conformity with all
12 laws, rules and regulations.

13 Q Was it your understanding of that sentence that
14 that applied to statutory copyright requirements?

15 A I so thought at the time.

16 Q Mr. Popper, I don't know whether the questions
17 were asked of you by Mr. Goldberg, but are you a copyright
18 attorney? Have you familiarity --

19 A I don't believe there is any category of
20 copyright attorneys, but having practiced in the field of
21 copyright laws for many years and handled a considerable
22 number of cases, without saying I am admitted to the copyright
23 bar, for there is no such -- I consider myself a person
24 really learned in the field of copyright law.

25 Q You are familiar with statutory copyright

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Popper-cross

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requirements, at least as far as we mortals as attorneys might be so familiar with them?

A In all modesty, yes.

MR.ROBERT STOLL: Thank you.

In the negotiations on October 20th, which led up to the agreement of October 20th, the license agreement, was there any approval on the part of Greeff or Greeff's attorneys to the use by Belle of a single copyright notice for a full bolt of fabric?

A The question of a single copyright notice wasn't discussed in those specific terms, and there was no specific approval, since it wasn't discussed.

Q Did Greeff or its attorneys specifically approve the use of a copyright notice on a hang tag or piece ticket or tag -- and I don't mean to confuse those terms, but I am using them collectively now -- at the negotiations which led up to this agreement?

A No. The agreement specifically says that there is a certain form of copyright notice, and that copyright notice is to be applied to the fabric. It doesn't say to a tag but to the fabric, or reproduction of the copyrighted design.

THE COURT: Would that sticker be a violation of that as far as you are concerned, since it is not on the

1 mpbr Popper-cross 163

2 fabric but it is on a sticker?

3 MR. ROBERT STOLL: By "sticker", are you
4 referring to these?

5 THE COURT: Yes. The ones he had printed.
6 Would you consider that to be on a fabric.

7 THE WITNESS: I would since -- I don't want
8 to volunteer information, but since the original controversy
9 arose, Mr. Lewkowicz has very recently told me of his
10 problems, and the only feasible way of putting it on the
11 fabric would be by imprinting the copyright notice on a label
12 which is secured to the goods.

13 THE COURT: Well, the reason I asked you
14 that is because you stressed and underlined by intonation
15 that it should be on the fabric in contradistinction to the
16 hang tag or the tag which was clipped or stapled to the material.

17 THE WITNESS: Yes, sir.

18 Q Your intonation in that regard, Mr. Popper, that
19 was in connection with the discussions had on October 20th,
20 is that correct?

21 THE COURT: That's exactly what I am saying.
22 And in strict semantics that label is not on the fabric. The
23 copyright is on a label which in turn is then affixed to the
24 fabric, if you want to be strictly semantically correct about
25 it.

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Popper-cross

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Did you have any part in making a judgment as to whether that was sufficient or not?

A Oh, no, sir.

THE COURT: You didn't?

THE WITNESS: I was glad not to become involved in any technical acts of compliance. I just wanted to get my client off the hook.

Q Was it not your understanding, Mr. Popper, at the October 20th meeting, that the copyright notice was to be applied to the selvage or the back of the fabric?

MR. GOLDBERG: Objection. That has been gone over in the Court's questions.

THE COURT: I realize that, but it is not fair for the Court to ask questions.

You forget you are a lawyer, and you sit here as a witness. It is not a jury case.

The strict compliance would be to put it on a fabric, whereas this is a sticker put on the fabric which has a legend. But that's neither here nor there.

You conduct your examination.

Q Was it your understanding that it was the intention of the parties that the copyright notice was to be placed directly on the fabric?

MR. GOLDBERG: Objection, your Honor.

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Popper-cross

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1 I don't know how this witness can testify as to the in-
2 tention of the plaintiff.
3

4 THE COURT: He is asking him for his under-
5 standing.

6 MR. GOLDBERG: He said of the intention
7 of the parties.

8 THE COURT: All right. I would suggest you
9 relate it to him as you did before.

10 Was it your understanding of what you were
11 supposed to do?

12 THE WITNESS: Your Honor, it was my understanding
13 that a rubber stamp would be supplied to my client and he
14 would use that rubber stamp to imprint the copyright notice
15 on the fabric, and that is the --

16 THE COURT: No, we are getting back to exactly what
17 I was saying before. You didn't contemplate this sticker
18 on here, did you?

19 THE WITNESS: No.

20 THE COURT: You thought it could be done right
21 on the fabric, whereas, as he explained it, ink wouldn't come
22 off or something, and that he had trouble finding out what to
23 do?

24 THE WITNESS: I didn't know the back of the
25 fabric would be coal black and that the rubber stamping

1 mpbr

Popper-cross-redirect

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2 wouldn't be visible.

3 REDIRECT EXAMINATION

4 BY MR. GOLDBERG:

5 Q Mr. Popper, I am confused. You state now that
6 you believed then that the notice was to be affixed directly
7 to the fabric, but at your deposition, when you already knew
8 that it was applied to the piece ticket, you stated --

9 A Just a moment --

10 Q Let me finish -- you already knew that it was
11 applied on the piece ticket. You saw it there in your office,
12 and you said "I certainly believe he has lived up to his
13 agreement to affix a copyright notice."

14 Didn't you state that at your deposition?

15 A As you state it to me, but your interpretation
16 is not in accordance with what I intended.

17 Q What did you intend, sir?

18 A I intended that the notice, if not applied to
19 the fabric, might be applied, by virtue of the impossibility
20 of putting it on the fabric, on a ticket which is affixed
21 to the fabric.

22 Q And it was then, your opinion, was it not,
23 Mr. Popper, and isn't it your opinion now that the --

24 MR. GOLDBERG: Strike that.

25 Q Mr. Popper, you said a few moments ago that you

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Popper-redirect

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1 understood the license agreement -- and I will refer to that
2 later -- since it is an exhibit -- in the last sentence in
3 the paragraph, not only the first one, which referred to a le-
4 gal notice -- you stated if I got your testimony correct,
5 that you believed that Belle had to comply with statutory
6 requirements for copyright notices; is that correct.
7

8 A I used the language of the paragraph which says,
9 and I quote "In strict conformity with all laws, rules and
10 regulations."

11 Q Would you read the whole sentence from the begin-
12 ning?

13 A Period.

14 Q No, you started in the middle. Read the
15 whole sentence from the beginning.

16 A Just this last sentence?

17 Q Please.

18 A "Belle covenants and agrees to sell the fabric
19 licensed hereby in strict conformity with all laws, rules
20 and regulations."

21 Q Does it say anything in that sentence about a
22 copyright notice?

23 A Well, if it is a copyrighted fabric, it is the
24 obligation of the vendor to apply a copyright notice. Other-
25 wise he forfeits his copyright.

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Popper-redirect

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Q And did you understand, then, that it was Belle's obligation to comply with the statutory copyright notice requirements under the license?

A Yes. I believe I understood that.

Q Did you advise your client, Belle, what those statutory requirements were?

A No, I didn't. I advised him what the agreement provided.

Q And you told him to live up to the agreement?

A Yes. In fact, I discussed the agreement with him -- well, I don't want to violate any rules with respect to communications between attorney and client, so I think I should forego making that statement.

Q Fine, Mr. Popper.

When you advised -- I'm not asking you to say anything now beyond what you have already done on your deposition -- when you advised Mr. Lewkowicz with respect to the settlement of the case you painted for him a very dark picture with respect to what would happen to him if he didn't settle, didn't you?

A I wouldn't say I painted a very dark picture. I painted a picture of the fact that here he was selling a fabric --

Q Is the answer "no", Mr. Popper, you didn't

1 mpbr

Popper-redirect

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2 paint a dark picture?

3 A I don't think the term "dark" is as accurate
4 as it should be. I told him of the legal consequences of
5 being a copyright infringer with respect to damages, profits,
6 counsel fees and, if wilful, the possibility of the
7 Court multiplying the damages by a certain factor.

8 Q Did you say -- I am quoting now your
9 deposition, Mr. Popper, on page 12 "I painted a picture for
10 him that there would be depositions, there would possibly
11 be a Master appointed, that possibly the plaintiff would prove
12 his gross sales, that it would be up to him to mitigate the
13 gross sales and he would be liable for accounting for his
14 damages. That the plaintiff might claim damages as a result
15 of loss of sales and in addition there might be a
16 counsel fee allotted to him, and if there was evidence of
17 wilful infringement the Court might be persuaded to give
18 multiple damages."

19 A That's what I just said in substance.

20 Q I didn't say it wasn't.

21 A But I didn't say "dark picture".

22 Q When you went to the Stolls to negotiate the
23 settlement, did you tell them either they give a licence or
24 no settlement?

25 A No.

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2 Q When you went in there, you were in the
3 position, weren't you, of a suppliant, of a person saying,
4 "Look, you have got me dead to rights. I won't do it
5 any more. We'll pay you \$10,000 and by the way we would like
6 a license".

7 Is that what happened?

8 A I think that's quite accurate.

9 Q So the license wasn't a condition to the
10 settlement of the lawsuit, was it?

11 A No.

12 MR. GOLDBERG: No further questions.

13 RECROSS EXAMINATION

14 BY MR. ROBERT STOLL:

15 Q Did you not testify that you importuned
16 Greeff's attorneys to issue the license for your client,
17 Belle?

18 MR. GOLDBERG: There has already been testified
19 testimony to that effect, your Honor.

20 THE COURT: That's so. That's what he said.

21 Q Do you consider that request of yours to have
22 been an urgent request on behalf of your client?

23 A I considered that my client might fall into
24 disrepute if he had to refuse to sell a fabric that he had
25 shown, and his customers would look upon him as a welcher,

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Popper-recross

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2 and I hoped that a license could be had so that he could
3 fulfil his commitments to his customers, but I wanted to get
4 him out, and I would have settled whether he got a license
5 or not. That is, I would have urged him to settle whether
6 he got a license or not.

7 Q To use a phrase that you refused to adopt be-
8 fore, and that is to paint a dark picture, I wonder if that
9 phrase would apply to the picture which you painted at the
10 settlement negotiations of the consequences to Belle of not
11 having to license, which is Exhibit C.

12 A I would rather use the term "a picture of serious
13 consequences", since so far as monetary damages and counsel
14 fees are concerned --

15 Q I am referring now to the picture which you paint
16 to Greeff's attorneys of the consequences to Belle of not
17 getting the license agreement of October 20th.

18 MR. GOLDBERG: Your Honor, the witness has
19 already said that he asked for it and that it would put
20 them in disrepute.

21 MR. ROBERT STOLL: I am sorry. Was your
22 question directed to that? I misunderstood it, if it
23 was.

24 THE COURT: Well, there were two things he is
25 suggesting to you.

mpbr

Popper-recross

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One, was that you were a suppliant because you knew that your client, if he didn't get the license, would suffer more damage.

THE WITNESS: Yes.

THE COURT: That's one picture.

The other picture is what would happen to your client if he didn't settle the case. That's another picture.

THE WITNESS: Yes.

THE COURT: They are both serious, right?

THE WITNESS: Yes.

Q Do you recall indicating to Greeff's attorneys that you would recommend to your client, Belle, that the case be settled even if there were no license agreement granted?

A I don't think that I indicated that. That would rather be tipping my hand. I had my partner there, and we were trying to negotiate a modest settlement from a money point of view, and hopefully to negotiate a license, and after we got finished with the question of damages we discussed the question of a license, and I was told, if I recall correctly, that Mr. Robert Stoll said that he could make no commitment in that regard and it would have to be referred to Mr. Johannsen --

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Popper-recross

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Q Johann.

A -- who might veto the proposition of a license, which I was seeking. And the agreement was drawn and executed by my client with the license provision in it, but I was given to understand very distinctly that it might be approved.

Q I wonder if you can answer this question without violating an attorney-client confidence.

Did you instruct your client, Belle, not to ship any goods until a license had been granted and the appropriate copyright notice rubber stamp received and used?

A I didn't get into that area at all. I thought it was implicit in the license --

MR. GOLDBERG: Your Honor, can we not have a volunteering of the witness?

THE COURT: The latter part. Leave the first part in, that he didn't get into it at all.

Q Did you think that requirement was implicit in the license?

MR. GOLDBERG: Oh, objection.

THE COURT: Sustained.

Q I refer you, Mr. Popper, to Defendant's Exhibit A, which purports to be the judgment approved by

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Popner-recross

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Judge Lacey in the Greeff v. Belle litigation. I am sure you have a copy but I can hand you one for your convenience.

A I have a copy filed by the clerk, original filed October 2, 1975.

Q That would probably be October 20th, after the judgment -- I refer you to Paragraph 5 of that judgment, where it states "Plaintiff shall have judgment against the defendant in the sum of \$10,000," and I ask you if you recall what the basis of that \$10,000 figure was.

A As it says there.

Q To assist you in that, I would refer to the first paragraph --

MR. GOLDBERG: Your Honor, he didn't say he needed any assistance as it states there. The document is in evidence.

THE COURT: In addition to which there wasn't anything on cross-examination, if I remember.

MR. ROBERT STOLL: In that case, your Honor, I have no further questions.

(Witness excused.)

(Adjourned to July 14, 1976, at

10:00 a.m.)

1 mpb-1

2 Greeff Fabrics, Inc.

3 vs.

76 Civ. 1188

4 Malden Mills Industries, Inc.

6 New York, New York.

7 July 14, 1976 - 10:20 A.M.

8
9 (Trial resumed.)

10 MR. ROBERT STOLL: If it please the Court,
11 reserving full right for rebuttal to any defenses which
12 may be raised, including reading of portions of the
13 transcript of the deposition which I mentioned yesterday --
14 reserving that right, plaintiff rests.
15

16 MR. GOLDBERG: Your Honor, at this time the
17 defendant will respectfully move to have the complaint
18 dismissed.

19 I would like if I may, your Honor, to argue
20 that motion, each count separately.

21 The second cause of action in the complaint
22 alleges a violation of the Lanham Trademark Act, 15 UCS
23 Sec. 1125A. We have already presented a br ief to
24 the Court in opposition to a motion for partial summary
25 judgment made by the plaintiff on that cause of action,

1 mpb-2

2 in which we have endeavored to show that there is no
3 cause of action under the Lanham Trademark Act for misuse,
4 alleged misuse of a copyright notice.

5 On the contrary, Congress provided specifically
6 in the copyright statute for a criminal offense for
7 misuse of a copyright notice. Congress didn't provide
8 a civil cause of action for it, and in fact there has never
9 been a case that has held anyone liable under the
10 Lanham Act for misuse of a trademark notice.

11 Now we have something additional, because there
12 is no evidence whatsoever that plaintiff was in any way
13 damaged or likely to be damaged by the defendant's use --

14 THE COURT: Well, I would rather hear the other
15 side on this, because I agree with you as far as Count 2
16 is concerned.

17 MR. ROBERT STOLL: Would you like to hear
18 that first?

19 THE COURT: Yes, if you want to split that up,
20 all right.

21 MR. SAMUEL STOLL: Your Honor, why not have
22 the entire argument made now on behalf of --

23 THE COURT: Well, I grant this motion now
24 on this one, because if he doesn't want to say anything
25 about the --

mpb-3

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1 MR. SAMUEL STOLL: Of course we do.

2 THE COURT: Well, go ahead and say it. It
3 seems to me there are separate issues and there is no proof
4 at all here, not even a scintilla as to the threshold
5 question involved here.
6

7 MR. ROBERT STOLL: Counsel has involved that
8 Section 43(a) of the Lanham Act is not directed to copyright
9 notice.

10 THE COURT: What about the threshold question
11 of the damages? The only one you put on here was a
12 fellow from North Carolina.

13 MR. ROBERT STOLL: That fellow from North
14 Carolina uses the plaintiff's --

15 THE COURT: But he never saw this. He never
16 had anything to do with it.

17 MR. ROBERT STOLL: As far as damages are
18 concerned, 43(a) doesn't require a showing of damage.

19 the language of the section itself it says "...by any
20 person who believes that he is or is likely to be damaged."

21 THE COURT: Well, I don't find that there is
22 evidence to show that. There is purely a legal question,
23 as far as I am concerned, and I grant the motion with an
24 exception to the defendant.

25 On the other counts, I find that there is suf-

1 mpb-4

2 ficient, and I will deny the motion.

3 MR. GOLDBERG: May I be heard on that motion,
4 your Honor?

5 THE COURT: You can be heard, but you aren't
6 going to change my mind. I think there is sufficient here
7 for you to go to your proof on this.

8 MR. ROBERT STOLL: Your Honor, when we get
9 the transcript, may we show you in the transcript where
10 damage was shown?

11 THE COURT: You could have gone to the Appellate
12 Court last night, because I looked at my notes last night
13 and I made up my mind that there is not sufficient for
14 this count.

15 You have an exception to the Court's ruling.

16 Now, the defendant's case as to Count 1.

17 MR. GOLDBERG: Your Honor, as our first --
18 may I have a moment, your Honor?

19 THE COURT: Go ahead.

20 (Pause.)

21 MR. GOLDBERG: As my first witness, your Honor,
22 I would like to call Milton Glasser.
23
24
25

1 mpb-5

Glasser-direct

2 M I L T O N J. G L A S S E R, called as a witness
3 by the defense, being first duly sworn, was examined
4 and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. GOLDBERG:

7 Q Mr. Glasser, by whom are you employed?

8 A Malden Mills, Inc.

9 Q Is that the defendant in this action?

10 A Yes, sir.

11 Q Actually, the defendant is listed as Malden
12 Mills Industries, Inc. Who is that?

13 A Malden Mills Industries is the selling organiza-
14 tion for Malden Mills.

15 Q And what is your position, sir?

16 A I am division manager of the Print Division
17 of Malden Mills.

18 Q Mr. Glasser, we will show you a piece of fabric
19 that has been marked Defendant's Exhibit E, and ask you
20 if you have seen the design in that fabric before,

21 A Yes, I have.

22 Q Do you recall, sir, when is the first time you
23 saw it?

24 A Approximately October 21, 1975.

25 Q And what did you see at that time?

1 mpb-6

Glasser-direct

2 A There was approximately a yard sent to me
3 for inspection as to whether it could be made and inserted
4 into our print line.

5 Q And can you describe this piece of fabric that
6 you received on that day?

7 A Yes. It was approximately a yard long, linear.

8 Q And what about the width?

9 A It was full width, including both selvages.

10 Q Was there any notice or notation on the fabric?

11 A None whatsoever.

12 Q Did you inspect the fabric both front and
13 reverse side?

14 A Yes, sir.

15 Q And there was no notice anywhere?

16 A None.

17 Q What did you do with that piece of fabric, sir?

18 A It was -- on the same day it was sent to our
19 screenmaker, Elmtex Engraving to see if it would be practical
20 for them to make printing screens.

21 Q Sir, did you send that along with a purchase
22 order?

23 A Yes.

24 Q I am going to show you a document as soon as
25 it is marked.

mpb-7

Glasser-direct

xxx

(Defendant's Exhibit K was marked for
identification.)

MR. ROBERT STOLL: May I see it?

MR. GOLDBERG: Mr. Stoll, I haven't offered it.

THE COURT: I don't want this practice of
looking at exhibits before they are offered. I don't
allow it in a court over which I preside.

MR. ROBERT STOLL: I merely want to see what he
is showing him.

MR. SAMUEL STOLL: Your Honor, I understand
your Honor's ruling, but when questions are asked of the
witness concerning a document that we don't see, how can we
evaluate those questions and direct objections if we
choose to bring it to the attention of the Court?

THE COURT: That does not persuade me either.
I have never seen this done by other lawyers, frankly,
and I have been trying cases for many years. I have
never seen lawyers take the papers out of the lawyer's hand
while he is walking up and saying "Let me see that," and take
it away from him.

MR. SAMUEL STOLL: Your Honor, naturally,
what we do is to hand it to the opposing counsel before it
is handed to the witness, but I accept your Honor's ruling.

THE COURT: But that doesn't mean that he is

1 mpb-8

Glasser-direct

2 entitled to that. You are very gentlemanly in giving him
3 more than he deserves.

4 There is no reason why you have to anticipate
5 what the lawyer is going to do. I am not being any
6 different in this case than in any other cases that I have
7 had. It surprises me that you think you have a right
8 to do that, because before anything gets to the Court it
9 must be received in evidence, and nothing can be read
10 from it until then.

11 MR. SAMUEL STOLL: But all of the questions and
12 answers go into the record, there may be 100 questions and
13 answers with respect to a document that we haven't seen.

14 THE COURT: But it will never affect the
15 Court, because there is nothing brought out about it. There
16 is nothing brought out from the document until it is
17 received in evidence, that the Court is aware of.

18 But in this case it is almost silly to the
19 point where these documents have been going back and forth
20 before. You have had complete discovery. You practically
21 know what is in each other's pockets. So I don't see that
22 there are going to be any surprises here. Everything you
23 have had so far is something that you have already seen.

24 MP. GLLDBERG: We have already sent them a
25 copy of this.

1 mpb-9

Glasser-direct

2 THE COURT: I know that. That is the usual
3 thing in Federal practice. This really is a tumult in a
4 teapot. It is just as easy to hand it to him before as
5 afterwards.

6 MR. GOLDBERG: It just takes up additional time.
7 I hope we can get finished today.

8 Q Mr. Glasser, I show you a document which has
9 been marked Defendant's Exhibit K for identification, and
10 ask if you can identify it.

11 A Yes. This is a photostat of a purchase order
12 which we sent to Elmtex.

13 Q Is this the purchase order which you sent to
14 Elmtex with the piece of fabric about which you just testi-
15 fied?

16 A Yes, sir.

17 MR. GOLDBERG: I offer it.

18 MR. ROBERT STOLL: No objection.

19 (Defendant's Exhibit K for identification
20 was received in evidence.)

21 Q Now, sir, what was the next thing that you did,
22 if anything, regarding this purchase order and the piece
23 you sent to the screen maker?

24 A Within the day I called the screen maker and
25 told them as soon as they had received this pattern to

1 mpb-10

Glasser-direct

2 look it over and to hold it in abeyance until such time
3 as they heard further from me.

4 Q You say that was within a day or two after the
5 purchase order?

6 A Yes. I wanted to allow enough time for it
7 to get there before I did anything --

8 Q I see. And what was your purpose, sir, in
9 putting this hold on this order?

10 A Well, we wanted to make sure by inspection of
11 another piece of cloth that there was in fact no copyright
12 logo on the piece of cloth.

13 Q Well, what did you do, Mr. Glasser, then to
14 make that determination?

15 A I called our New York office and requested that
16 they get a sample of cloth anywhere three to ten yards or
17 whatever, they could find, so that we in fact could inspect
18 it again to make sure that there wasn't any copyright logo
19 on the cloth.

20 Q Who was in charge of your New York office?

21 A In the upholstery division?

22 Q Yes.

23 A Mr. Sanford Levine.

24 Q Did there come a time, sir, when you did
25 receive another piece of this fabric?

1 mpb-11

Glasser-direct

2 A Yes. I received approximately ten yards.

3 THE COURT: When did you receive it?

4 THE WITNESS: About November 10, 1975.

5 Q I now call your attention again to Defendant's
6 Exhibit E, which is in front of you now, and ask you, sir,
7 if you can identify that as the 10-yard piece that you
8 received on or about November 10, 1975?

9 A Yes, sir, it is.

10 MR. GOLDBERG: I note from the ticket that it
11 still seems to have been only offered for identification.
12 If that is the case, I will now offer it in evidence.

13 MR. ROBERT STOLL: If it please the Court, it
14 was offered in evidence and an objection was raised and
15 your Honor accepted it in evidence subject to connection,
16 and no connection has yet been shown. I believe that is
17 true, if I am not mistaken, on both of these specimens.

18 THE COURT: What is the clerk's record?

19 THE CLERK: Yes. It was received yesterday,
20 Judge.

21 MR. ROBERT STOLL: We maintain our objection
22 and continue it.

23 THE COURT: I will rule on it when all the
24 evidence is in.

25 Q Mr. Glasser, with respect to this 10-yard piece

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Glasser-direct

which is in front of you, Defendant's Exhibit E, you say
you received that on or about November 10?

A Yes, sir.

Q After you received it, what did you do with it?

A We ran it out on a table and inspected it, both
face and back, from selvage to selvage and from end to end
to make sure that there were no markings whatsoever that
would indicate a copyright.

Q Were there any such markings?

A No, sir.

Q Were there any markings at all?

A None.

Q What did you then do with the 10-yard piece?

A We rolled it up and put into a carton which we
keep for this type of thing, so that if any problem develops
we have it, like we have it here.

Q And was that carton kept under your personal
custody and control?

A Yes, in the Print Division.

Q And it is your practice in the normal course of
your business activities to maintain a box of such physical
exhibits?

A Yes, sir, it is. It is the company's policy.

Q And, sir, when did you go back to that box to

1 mpb-13 Glasser-direct

2 do something with the fabric again?

3 A Only after I had information from our New York
4 office that they had been served with papers concerning
5 this suit.

6 Q What did you then do with the piece of fabric?

7 A We reinspected it to make sure that we didn't
8 miss anything and it was, as I said before, it had no marking
9 on it whatsoever.

10 Q What did you do with it then?

11 A After speaking to you, we forwarded it to you.

12 Q You sent it to my office?

13 A Yes.

14 MR. GOLDBERG: Your Honor, we would again offer
15 this. I think we have now connected it quite specifically.

16 MR. ROBERT STOLL: On the contrary, your Honor.
17 The point of objection is that there is no showing of
18 whether these particular specimens of fabric were sold by
19 Belle or shipped by Belle before or after the date in
20 question, the date of the license agreement, October 20.

21 There is no testimony whatsoever touching on it,
22 much less proving the point. As a matter of fact, with
23 respect to the first sample, the one-yard specimen, which
24 is not here in evidence, as to which testimony has been
25 given, I believe Mr. Glasser testified that he received it

1 mpb-14

Glasser-direct

2 on October 21, while Mr. Lewkowicz testified that he
3 couldn't have sent it out on October 20, the day before,
4 which would tend to date that specimen prior to the license
5 agreement.

6 MR. GOLDBERG: Your Honor, Mr. Lewkowicz
7 didn't testify he could not have sent it out on October 20 --

8 THE COURT: You know, when I listened to Mr.
9 Lewkowicz there was never a time that he made a categorical
10 statement that I remember. He was such a witness, that
11 I wouldn't buy a three-dollar bill from him, because I
12 would suspect --

13 MR. ROBERT STOLL: He did testify categorically
14 that he didn't ship anything out --

15 THE COURT: You read the testimony and see if
16 you can say he said that categorically, but I don't remember
17 him saying anything categorically.

18 MR. GOLDBERG: In this instance he did. He
19 said, "I have no recollection whether I sent it out the
20 day before, the next day." He didn't know.

21 THE COURT: In any event, I am going to take
22 this with an exception to the defendant.

23 MR. ROBERT STOLL: You aren't making a
24 determination that this was received --

25 THE COURT: You aren't complaining about the

1 m;b-15 Glasser-direct

2 nexus of this particular piece, namely, from the time he
3 said he got it until it was delivered here, because he
4 would have to testify that he brought it here. You aren't
5 complaining about that part?

6 MR. ROBERT STOLL: We aren't complaining about
7 Mr.Glasser's testimony as to when he received it.

8 THE COURT: If that is the case, then I will
9 receive it with an exception to the plaintiff, without making
10 any judgment. I am going to analyze the evidence and
11 make my own judgment as to whether it is part of the case.

12 MR. GOLDBERG: Your Honor, Mr. Lewkowicz did
13 testify that without a ticket on it he could not testify --

14 THE COURT: I am fully aware of what Lewkowicz
15 testified to, and I remember how he testified, so I have
16 no problem about how he testified.

17 MR. GOLDBERG: I want to point out that it
18 would be ironic that by leaving out the notice on licensed
19 goods, because there is no way of knowing when we got it --

20 MR. ROBERT STOLL: As long as we are on the
21 point, may I ask counsel if he does have any information
22 as to when these two exhibits were shipped by Belle, whether
23 before or after the October 20th date.

24 MR. GOLDBERG: Which exhibits are we talking
25 about?

1 mpb-16

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2 THE COURT: Exhibit E is really what we are
3 talking about.

4 MR. GOLDBERG: We can only assume since we
5 got it around November 10th that there is a very good poss-
6 ibility that it was shipped by Belle after --

7 MR. ROBERT STOLL: That proves --

8 MR. GOLDBERG: May I finish? -- that it was
9 shipped by Belle after the date of the license, but because
10 there is no identifying ticket or notice on it, there
11 is absolutely no way anybody can know when it was done.

12 We certainly don't think that exculpates the
13 plaintiff.

14 THE COURT: Unless you can show that it was
15 removed or fair inferences can be drawn that they were
16 removed.

17 MR. ROBERT STOLL: I take it, then, that counsel
18 has no evidence which would establish whether they were
19 shipped by Belle before or after the October 20th date.

20 MR. GOLDBERG: I think it has been made clear
21 that there is nobody in the world who could have such
22 evidence. It is a physical impossibility.

23 THE COURT: I gather the answer is yes.

24 MR. GOLDBERG: Yes, your Honor.

25 THE COURT: All right.

1 mpb-17

Glasser-direct

2 Q Now, sir, after you received Defendant Exhibit
3 E, the fabric that is in front of you, and you inspected
4 it and found no markings, did you take any further action
5 regarding the screen maker at that time?

6 A Yes. Since we couldn't find any indication
7 of copyright, we called on the phone and asked them to
8 proceed with the manufacture of the screens.

9 THE COURT: When was this?

10 THE WITNESS: Approximately November 10, your
11 Honor.

12 Q Now, sir, did there come a time when you did
13 receive screens from Elmtex of the design embodied in
14 Defendant's Exhibit E?

15 A Yes, sir.

16 Q About when was that?

17 A About the 1st of December.

18 Q Was there an invoice accompanying those screens?

19 A No; that comes in the mail, but that was
20 dated November 26.

21 Q I see. Well, let me ask you the question again:
22 Did you receive an invoice covering those screens?

23 A Yes, sir.

24 MR. GOLDBERG: As soon as it is marked, I am
25 going to show you a document.

1 mpb-18

Glasser-direct

2 (Defendant's Exhibit L was marked for
3 identification.)

4 Q I show you, Mr. Glasser, Defendant's Exhibit L
5 for identification and ask if you can identify it?

6 A Yes, sir. This is an invoice, a photo --

7 Q Will you speak up?

8 A Yes. That is photocopy of an invoice from
9 Elmtex who manufactures screens for us.

10 Q Covering the screens for this design?

11 A Yes.

12 MR. GOLDBERG: I will offer it.

13 MR. ROBERT STOLL: Have you a copy?

14 MR. GOLDBERG: I beg your pardon?

15 MR. ROBERT STOLL: Have you a copy?

16 MR. GOLDBERG: I think you have a copy. I
17 gave you a copy. In answer to your interrogatory I gave you
18 a copy..

19 MR. ROBERT STOLL: All right. No objection.

20 (Defendant's Exhibit L for identification
21 was received in evidence.)

22 Q Mr. Glasser, were the screens accompanied by
23 a bill of lading?

24 A Yes, sir.

25 Q Sir, is Defendant's Exhibit M for identification

1 mpb-19

Glasser-direct

2 that bill of lading?

3 A Yes, sir.

4 Q Or rather a photocopy of that bill of lading.

5 Do you say yes?

6 A Yes.

7 MR. GOLDBERG: I offer it.

8 MR. ROBERT STOLL: No objection, your Honor, but
9 we are certainly not conceding the relevance of these
10 exhibits.

11 THE COURT: It will be received.

12 (Defendant's Exhibit M for identification
13 was received in evidence.)

14 Q Mr. Glasser, what did you do with the screens
15 when you received them?

16 A When the screens arrived, we matched the colors,
17 and struck it off on the table to two or three different
18 color combinations.

19 Q I didn't hear the last thing you said?

20 A There were two or three different color combina-
21 tions.

22 Q And did you make strikeoffs of these screens?

23 A Yes.

24 Q About when were they ready?

25 A Approximately the first week in December.

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Glasser-direct

[11]

1 Q Do you recall, sir, when you began offering
2 your fabric containing this or a similar design to the
3 public for sale?

4 A I don't remember the exact dates.

5 Q Would you have any knowledge of that, because
6 of course you aren't in sales. I realize that.

7 A No, because just to explain --

8 Q No, if the answer is no, the answer is no.
9 Now, sir, on or about March 11, 1976, did
10 Malden receive a summons and complaint and an order to show
11 cause for a preliminary injunction from Greeff Fabrics?

12 A Yes, it was received in New York.

13 Q About that day?

14 A Yes.

15 Q And you became aware of it shortly thereafter,
16 sir?

17 A Yes.

18 Q Had you, before that, known that Greeff claimed
19 copyright in this design?

20 A I never heard of Greeff before this.

21 Q You never heard of Greeff at all?

22 A No.

23 Q Did you know that anybody claimed a copyright
24 on this design?
25

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Glasser-direct

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2 A No, sir.

3 Q Sir, after this action commenced on or about
4 March 11 of this year, did you obtain any additional fabric
5 containing this design?

6 A Yes.

7 Q Mr. Glasser, I am showing you now a piece of
8 fabric which has been marked Defendant's Exhibit F for identifi-
9 cation and I ask you if you can identify this piece of
10 fabric.

11 A Yes. This is a five-yard sample which we
12 received from the market.

13 Q About when did you get that?

14 A I don't remember the exact date, but it
15 was shortly after -- after we were served, because I made
16 a call to get more samples.

17 Q What caused you to make that telephone call?

18 A Well, when I had the phone call from our New
19 York office that we had been served, it then occurred to me
20 that perhaps we ought to check and in fact find out if
21 maybe those additional samples we had were a freak and
22 that there was in fact a copyright on the piece of goods.
23 We asked our New York office to get in touch with our
24 various offices and to quickly pick up some additional
25 yardage so that we could now check again and see if there

mpb-22

Glasser-direct

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1 was a copyright on the goods.

2 Q And did you receive additional yardage?

3 A Yes, we received this sample which we have in
4 front of me.

5 MR. GOLDBERG: That is marked Defendant's
6 Exhibit F.

7 Q Now, sir, there is a sample attached to that
8 fabric now marked "Belle Fabrics." Was that tag on the
9 sample when you received it?

10 A Yes, sir.

11 Q Can you tell the Court in what way it was
12 affixed to the fabric?

13 A It was stapled to the sample.

14 Q Was there any other marking on the fabric?

15 A Well, since we now were aware that we were
16 under the gun, so to speak, we were looking to see if there
17 was someother way, and we looked by accident on the back
18 of the ticket and found this rubber stamp that appears on
19 it.

20 Q Was there any other marking anywhere on the
21 fabric other than the ticket?

22 A None whatsoever.

23 Q Now, sir, what did you do with that five-yard
24 piece after you examined it?
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mpb-23

Glasser-direct

A It was immediately forwarded to your office.

MR. GOLDBERG: Your Honor, again we suggest that it has been suggested and ask that it be admitted without reservation.

MR. ROBERT STOLL: On the contrary, Your Honor, there is no testimony, as Mr. Goldberg indicates, no evidence as to the date on which the fabric was shipped by Belle.

MR. GOLDBERG: Oh, yes. Mr. Lewkowicz testified that this fabric was imported by him on or about January 26, based on the piece ticket.

MR. ROBERT STOLL: That is absolutely untrue. Mr. Lewkowicz testified here both in the deposition and on the stand that the number identifies the piece that was imported on that date, but he specifically said that there was no way of identifying that ticket with that fabric or connect it, and Mr. Lewkowicz testified that in fact although he does sometimes staple tickets, many times he doesn't staple them. We do not know that this ticket is associated with this fabric. We know that the ticket identifies fabric imported as Mr. Lewkowicz testified in January of this year. Until there is a showing, a direct link-up to this fabric -- it is very simple, really: they know they got this fabric. Let the people testify that this was the fabric received from Belle and the ticket was

1 mpb-24

Glasser-direct

2 attached. It is very easy. The evidence does exist;
3 somebody knows it, and they have not brought in that
4 evidence.

5 MR. GOLDBERG: Your Honor, this is ironic.
6 The Courts have held that a hangtag doesn't identify a piece
7 of fabric, because there is a tendency for them to get
8 lost. So here we have a case where plaintiff's attorney,
9 who is trying to validate the copyright, says the
10 existence of the hangtag doesn't prove that it was attached
11 to this fabric before.

12 Now, I will ask Mr. Glasser the questions that
13 Mr. Stoll just suggested. I have no objection. Mr.
14 Stoll has already asked Mr. Glasser at deposition and he
15 knows the answers that will be given. The Court, of
16 course, doesn't know.

17 Q Mr. Glasser, do you know from whom this five-
18 yard piece was obtained?

19 A No, sir, I don't.

20 Q Do you know who would know that?

21 A It is quite unlikely because we made an inquiry
22 all over the market. We have a number of offices in the
23 various furniture markets, and one of the salesmen sent
24 it in.

25 At this point I don't know who it was.

mpb-25

Glasser-direct

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2 Q Was there any memorandum accompanying this
3 piece of fabric?

4 A No. Because of the urgency, I had given
5 instructions that when they pick it up to immediately go
6 to the post office with it and just send it out air special
7 delivery. This was the instructions I gave our New York
8 office.

9 Q Were your instructions not to do anything to
10 the fabric or anything on it?

11 A That's exactly right.

12 Q And when you received it did you personally
13 open up the package?

14 A Yes, I did.

15 Q Did you find this piece ticket stapled to it?

16 A Yes, I did.

17 MR. GOLDBERG: Your Honor, I think that is
18 connected.

19 MR. ROBERT STOLL: On the contrary, your Honor,
20 there is no --

21 THE COURT: Well, there are certain inferences
22 that it was stapled onto the fabric, because there
23 are certain practices in the industry.

24 I overrule the objection with an exception
25 to the plaintiff.

mpb-26

Glasser-direct

MR. ROBERT STOLL: We are now speaking of F.

I have maintained the same objection with respect to E, as to which there is no identification whatsoever. I trust your ruling doesn't extend to that.

THE COURT: At this time I am only ruling on F, right?

Q Mr. Glasser --

THE COURT: There is certainly no other copyright notice on this piece of material, is there?

MR. GOLDBERG: No, sir.

THE COURT: If there is any copyright notice at all it is on the tag.

MR. GOLDBERG: Yes, sir, and the very fact that it is now difficult to make absolute determination of the stores of the material is precisely what the Courts have held that a hangtag is insufficient to give notice of copyright.

THE COURT: I am not going to go into that. I only wanted to make sure -- like on the one year you there are some adhesive pieces on there. There is nothing like that on this.

MR. GOLDBERG: No, your Honor. This wasn't done until after the extension in April. This is Plaintiff's Exhibit 11.

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Glasser-direct

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2 "R. ROBERT STOLL: I would like to point out
3 that the question of whether the copyright notice was
4 affixed to the goods or not was a question which applies
5 at the time it left Belle's hands, not whether it is
6 attached here in court.

7 THE COURT: But there was clearly nothing on
8 the selvage. That is the point I am talking --

9 MR. GOLDBERG: Nothing, your Honor. Or the
10 back.

11 THE COURT: That is the only point I am trying
12 to make, whether there was anything on the selvage that
13 indicated the copyright.

14 MR. STOLL: That is not an issue here.

15 THE COURT: No, I just wanted to know whether
16 that is a fact.

17 MR. STOLL: I might say further that this
18 piece of fabric, this particular piece was acquired by
19 Malden at Malden's request for the purpose of this
20 litigation, and I suggest it is unbelievable on its face
21 to say that they don't know where it came from.

22 THE COURT: They know where it came from,
23 but they can't particularize the particular salesman.
24 That is part of your argument. You call it to my attention
25 and it will have some weight when I determine the factual

1 mpb-28

Glasser-direct

2 issues.

3 Q Mr. Glasser, how many salesmen do you have
4 around the markets who would have received instructions
5 to find this fabric?

6 A I don't know how many salesmen we have.

7 Q Can you make an estimate?

8 A It must be 35 or 40 salesmen in various markets.

9 Q Now, sir, I refer you again to Defendant's
10 Exhibit E, which is the 10-yard piece, and I call your atten-
11 tion on the reverse side to the notation which appears
12 to be stamped on in some manner, "Greeff Fabrics." Do you
13 know how that got there?

14 A Yes; I put it there.

15 Q Will you tell the Court how you put it there?

16 A When we had our discussion about whether it
17 was possible -- as a matter of fact, in the hearing we had
18 prior in this court, as to whether it was possible to
19 affix --

20 Q Mr. Glasser, let me interrupt you for a minute.

21 MR. GOLDBERG: May we plug in a small iron and
22 we believe it will show how that marking got on this fabric.

23 THE COURT: All right.

24 Q Mr. Glasser, will you continue, please.

25 A After the hearing at which I was present there

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Glasser-direct

1 was a conversation about being impossible and impractical to
2 put a permanent copyright onto this fabric, and I testified
3 that there were a number of ways to do that, and as a
4 result of that testimony, when I left the Court, I took
5 the simplest route and had people who make our chromograph
6 tooth transfers- because we use them as tooth marks on
7 all our pieces -- and as a matter of fact we put piece
8 numbers on all of them so it can be connected with the piece
9 goods in case there is a reason. And, by the way, it is
10 a trade practice. It doesn't appear on these pieces.

11 And after we had a sample made up by our
12 supplier of the heat transfer paper, in order to demonstrate
13 I had to make a sample with the name "Greeff Fabrics" on
14 it, and this has been transferred by that method to this
15 piece of cloth, and this will not come off of this piece
16 of goods.

17 Q It will not come off?

18 A And there is no way to take it off until you
19 start to completely reprocess this piece of goods.

20 Q Now, sir, I show you a roll --

21 THE COURT: Mark it first.

22 MR. GOLDBERG: Yes, sir.

23 (Defendant's Exhibit N was marked for
24 identification.)
25

mpb-30

Glasser-direct

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2 Q Mr. Glasser, I show you a roll of paper which
appears to have "Greeff Fabrics" in mirror writing, which
4 has been marked Defendant's Exhibit N for identification.
5 Is that what you had your people make up?

6 A Yes.

7 Q Is that what you call heat transfer paper?

8 A Yes.

9 THE COURT: While that is heating up, we will
10 take a five-minute recess.

11 (Recess.)

12 MR. GOLDBERG: Your Honor, just before the
13 recess I had offered Defendant's Exhibit N, the roll of
14 heat transfer paper as an exhibit.

15 MR. ROBERT STOLL: Except that the name of
16 my client is misspelled, there is no objection.

17 MR. GOLDBERG: Your Honor, that was done de-
18 liberately to make sure there would be suspicion it came
19 from any source except us.

20 It is spelled "G-r-e-f-f.

21 MR. ROBERT: No objection.

22 (Defendant's Exhibit N for identification
23 was received in evidence.)

24 Q Mr. Glasser, I am going to ask you now to
25 demonstrate to the Court the ease with which this legend

1 mpb-31

Glasser-direct

2 can be transferred from the heat transfer paper to Belle's
3 fabric, that is the 10-yard piece, Defendant's Exhibit E.

4 A (Demonstrating.)

5 THE COURT: I want to make a record on this,
6 myself.

7 At the beginning of the question he was asked
8 to do that, and it took him about 15 seconds to tear
9 off the piece and get it prepared to put on the fabric, and
10 then when he put the instrument on the fabric it took
11 about seven seconds before he took it off. I notice
12 there is an imprint on the material which reads "Greff
13 Fabrics."

14 MR. ROBERT STOLL: Your Honor, there was an
15 attempt to transfer the "C" in the circle, which was not
16 successful. It wasn't at all legible, and in fact the
17 two prior imprints do not have that symbol at all.

18 MR. GOLDBERG: Obviously, the "C" in the
19 circle is very small.

20 THE COURT: Well, that appears in the record
21 and anybody making this can draw his own conclusions
22 from it. They can see --

23 THE WITNESS: The paper was ordered by a telephone
24 call.

25 MR. ROBERT STOLL: May I suggest, while the iron

1 mpb-32

Glasser-direct

2 is hot, that the witness do the same thing to these other
3 exhibits.

4 MR. GOLDBERG: Your Honor, we have never seen
5 this fabric before. It is not up to us to do that.

6 THE COURT: Well, the thought came to me, too,
7 because it came up in connection with Mr. Popper. You
8 don't use the same kind of paper. You use the paper
9 where the white comes out rather than the black. So it
10 would have to be done with paper which would have the re-
11 verse on it,

12 THE WITNESS: It is customary to see a black
13 or a white yellow, because if a yellow is used it will show
14 on any dark color.

15 THE COURT: So you would have to have to
16 give him the paper. The point of the matter is that I
17 think my using the other color, it would make the same kind
18 of demonstration, but if you want to bring some yellow
19 paper and let him do it, it is fine with me.

20 Mr. Glasser, did you have this roll of heat
21 transfer paper marked Defendant's Exhibit N, prepared for
22 that imprinting the legend itself on Defendant's Exhibit E,
23 the 10-yard piece in front of you?

24 THE WITNESS: Yes. I got that just to prove the
25 point that I had made previously.

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Glasser-direct

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Q And, sir, is this a very expensive thing to buy, Defendant's Exhibit N?

A I had a quote on that. It is \$1.71 cents a thousand.

Q Does it take very long to get heat transfer paper made?

A Well, I went into our purchasing office and told them what I wanted and within a week they had this.

THE COURT: When you say \$1.71 a thousand, you aren't suggesting a thousand rolls?

THE WITNESS: No; imprints.

THE COURT: A thousand imprints of the name.

MR. GOLDBERG: For \$1.71.

MR. ROBERT STOLL: I regret that Mr. Lewkowicz is not here.

MR. GOLDBERG: Your Honor, is that an objection?

MR. ROBERT STOLL: No, it is a comment.

MR. GOLDBERG: I would like to finish with the witness.

THE COURT: All right.

Q Mr. Glasser, is there any procedure whereby heat transfer paper can be used other than by hand, the way you just demonstrated it?

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Glasser -direct

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A Yes.

Q How is that?

A It can be rigged to a frame, onto a measuring machine, where they roll a heated roll, and on the paper is spaced how far distance you want the repeat to appear, and it runs right with the goods and keeps transferring as the goods goes after this frame. It can be done before, during or after finishing.

Q So in other words, in a piece of fabric that would be imported in a finished state, or at least with a design in it, that could still be put in this process?

A Yes, it could run as fast as 30 yards a minute.

Q In other words, it would take under two minutes for any 50-yard bolt?

A Well, it would keep up with any process you put the cloth there, so there would be no additional cost.

Q But if you did have to have it go through an entirely new process, your estimate is it would be something like two minutes for 50 yards?

A Well, most people don't run that fast.

Q Well, how much really is it?

A 20 yards a minute.

Q Are there any other processes that can be used to print a legend onto a jacquard fabric?

mpb-35

Glasser-direct
cross

A Yes, there is an outfit in New Hampshire, which I know specifically, among others, where there is a metal roll like an engraving roll and it runs through any color ink or paste, pigment paste, and that transfers onto the cloth as fast as you want to run that machine.

Q Is this process well known?

A Well, any cloth man that I know of knows about heat transfers and transfer rolls. Heat transfers are common because people use it for proofmarks throughout the industry.

Q Just to finish --

MR. GOLDBERG: Well, I don't think I have to ask another question.

I have no further questions of Mr. Glasser.

CROSS-EXAMINATION

BY MR. ROBERT STOLL:

Q Mr. Glasser, you have testified, I believe, about receiving three specimens of fabric, two of which are in court as exhibits, but the first is not here as an exhibit, is that correct?

A That's right.

Q That is the one-yard sample?

A Yes.

Q Would you please repeat, if you have not already

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Glasser-cross

1 said it clearly enough, why the one-yard sample is not here
2 in court?

3
4 A Yes. The one-yard sample, I don't know exactly
5 what happened to it, but I can tell you what customarily
6 happens to the sample that goes to the screen maker.
7 Generally it is cut up in order to copy the figures and
8 it is used in their particular artwork that goes with the
9 work that they do. Usually then a small part of it comes
10 back with the screens, and the colorist at the mill will
11 use this for matching the shades. Usually he will apply
12 it to the card that he uses, and I tried to find that, and
13 I couldn't, and I didn't think at the time it was important
14 because we had so many other samples to compare it to.

15 Q When you say "cards" you mean color cards?

16 A The little cards they use for dye-stuff formula-
17 tion.

18 Q So that in the process of making the screens,
19 the screen maker uses up the specimen that you send to him?

20 A Between he and the people at the mill.

21 Q Well, he returns a small specimen of whatever
22 you send to him and that is further used?

23 A Whatever is left, if there is anything left.

24 Q There is no question, then, that your screen
25 maker used that first one-yard sample to manufacture

1 mpb-37

2 Glasser-cross

3 your Malden print?

4 A Yes, sir.

5 Q He didn't use either of the Exhibits E or F?

6 A No, sir.

7 Q When is it that you sent that one-yard sample
8 to the screen makers?

9 A Approximately October 21st, 1975.

10 Q Defendant's Exhibit K, which I believe you have
11 indicated is your purchaser order to your screen maker is
12 dated October 21, 1975, and that is what you base your
13 testimony on, as to when you sent it?

14 A Yes, sir.

15 Q Handing you that exhibit, I ask you what the
16 instructions are to the screen maker, which appear on that
17 exhibit.

18 MR. GOLDBERG: Objection, your Honor. It
19 speaks for itself.

20 THE COURT: You can read it to me. What does
21 it say?

22 MR. ROBERT STOLL: It is in rather abrupt
23 language.

24 MR. GOLDBERG: I wish counsel wouldn't charac-
25 terize it; just read it.

THE COURT: Well, if the witness can help us with

1 mpb-38

Glasser-cross

2 abbreviations. What are the instructions?

3 MR. ROBERT STOLL: Not to read them, but in
4 your own words what were the instructions that you placed
5 on that purchase order.

6 THE WITNESS: To make four screens, I guess
7 the pattern number which is number 1197. It inserts the
8 price per screen and then under it it lists three sets of
9 instructions, one being "repeat as large as possible,"
10 that means that on our given sizes, I presume you want me
11 to explain what this --

12 Q I am asking you to do that.

13 A On each screen we have a standard sized screen
14 that we use that fits well on our equipment, and with that
15 in mind they make as large a repeat from any pattern that
16 we given them, so that it will fit properly on these screens
17 and gives the most production that we are able to get from
18 this particular sized screen, and that is what "as large
19 as possible" means.

20 Stagger fit and good trackings wherever possible.
21 Stagger fit on screen printing means so that there was a
22 wave in the way they fit together so that when the layman
23 looks at the finished cloth he cannot see the beginning and
24 end of the screens. That's a stagger fit.

25 Good tracking means so that you won't see misses.

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Glasser-cross

2 The edges of the color lay on top of each other, and that's
3 what's known as tracking.

4 "Three, keep three inches on the side of the
5 screens." This is for the allowance for the color boxes
6 that carry the color across the screen.

7 Q I take it that those directions are entirely
8 sufficient to your screen maker to produce the screen that
9 you request. No additional information is necessary from
10 Malden?

11 A It is sufficient in the relationship that we
12 have.

13 Q Had the one-yard sample that you sent to your
14 screen maker contained a copyright notice, would you have
15 sent it to your screen maker?

16 MR.GOLDBERG: Objection. The testimony was
17 that it didn't. Why ask what he would have done if it did?

18 THE COURT: Sustained. Immaterial.

19 Q Does your screen maker require any further
20 approval to manufacture a screen other than the receipt of
21 this purchase order or after receipt of this purchase order?

22 A Not in dealing with us.

23 Q Not in dealing with you?

24 A No, sir.

25 Q The second of these three samples, the second

1 mpbr

2 Glasser-cross

3 one which is in evidence, and I believe it is Defendant's
4 Exhibit E -- was received by you about when?

5 A Approximately November 10th.

6 Q And how do you know that date, sir?

7 A Because that's the date that I called them, the
8 screen maker, and told them to proceed with the print.

9 Q How do you know you called the screen maker on
10 that date?

11 A Because I remember it very well, and it is
12 backed up by the time the screens were delivered.

13 Q Well, could it have been November 11th?

14 A I said approximately November 10th. It is
15 possible, but I think --

16 Q Could it have been a week prior to November
17 10th?

18 A No, sir.

19 Q Why not?

20 A Because it would have taken -- the screens
21 would have arrived much sooner than they did, and I remem-
22 ber specifically that that's when it came.

23 Q Do you have any documents which bear the date
24 November 10th or approximately November 10th which would
25 indicate that that was the date you called the screen maker?

MR. GOLDBERG: Do you mean Mr. Glasser

1 mpbr

Glasser-cross

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2 personally?

3 MR. ROBERT STOLL: Or Malden.

4 MR. GOLDBERG: You aren't necessarily referring
5 to any witness that Malden might have. You mean Mr. Glasser
6 or Malden as a company.

7 THE COURT: Is that an objection?

8 MR. GOLDBERG: I guess it is.

9 THE COURT: Overruled. Read the question.

10 (Question read.)

11 A No, sir.

12 Q Now, you say that November 10th date is based
13 on your recollection of that November 10th date.

14 A Personal recollection.

15 Q And it is based on the date on which the
16 screens were completed and shipped to you, as evidenced by
17 your screen maker's invoice and shipping document, is that
18 correct?

19 A No. Just that I remember it, and I just
20 said that that information backs it up.

21 Q You remember November 10th or approximately
22 November 10th?

23 A Yes.

24 Q Independently?

25 A I do.

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Glasser-cross

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Q What is it that makes you remember that date?
You say you have an independent recollection of it.

What is it?

A Just just remember it. I can't explain my thought processes.

Q Does it ever take your screen maker as much as one month to make a screen from the time you send the purchase order to them?

A Occasionally it does.

Q Was it approximately one month from the time you sent the purchase order to them to the time they shipped the screens to you?

A No, it was about two weeks.

Q What is the date that you sent the purchase order to them?

A The 10th -- oh, I am sorry. The purchase order. The purchase order was sent on October 21st.

Q And is that not approximately one month prior to the time they shipped the screens back to you -- or to you, not back to you?

A Yes, but that has nothing to do with it.

MR. GOLDBERG: The record will show how long it was, your Honor, it was more than a month. Why ask the witness?

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Glasser-cross

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2 MR. ROBERT STOLL: Because the witness says
3 that the screen maker does occasionally take as much as a
4 month to make screens.

5 THE COURT: Well, I don't want this to get into
6 a town hall meeting. Just put questions, and we will get
7 answers from the witness.

8 Q Do you have any other way of pinning down
9 that approximation November 10th date other than your
10 recollection and the date these screens were shipped back by
11 the screen maker to you?

12 A No, sir.

13 Q Do you have any documentary evidence, or
14 does Malden, which shows the date on which you received that
15 first one-yard sample, other than your purchase order
16 of October 21st?

17 A No, sir.

18 Q And you base your memory of the date of re-
19 ceipt, do you, on the date of the purchase order?

20 A Yes, sir.

21 Q Do you have any other recollection of it?

22 A No. The reason I have that recollection so
23 clearly is that it is a customary practice with us when samples
24 come in, unless there's some special reason, we send it
25 immediately to the screen maker, the same day, because we have

1 mpbr

Glasser-cross

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2 had a history of loss of samples. We try to get it right
3 out of the place just as fast as we can.

4 Q You didn't ask to have additional yardage
5 of that fabric brought to you for inspection of a possible
6 copyright notice before you sent the sample to your screen
7 maker?

8 A No. In order to save time, I sent it to him, and
9 I spoke to him on the phone within a day or two and told
10 him to look it over and see if there were any problems in
11 making this, because it is a different type of vehicle, and
12 that I would be in touch with him when he was to go forward
13 with it.

14 Q Mr. Glasser, in open court here, on the hearing
15 for a preliminary injunction I believe you testified on behalf
16 of Malden, and Mr. Goldberg asked you the following question.

17 "Q Mr. Glasser, after you saw and examined this
18 ten-yard piece which has been received in evidence as
19 Defendant's Exhibit A, what did you do, if anything?"

20 That was the question which was asked of you.

21 Do you know which ten-yard piece, do you recall
22 now which ten-yard piece the question referred to?

23 A This one here.

24 Q And that is now Defendant's Exhibit E, isn't
25 it?

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Glasser-cross

2 A Well, I don't know what the letters are,
3 but this is the one.

4 Q I believe that is E.

5 A Yes.

6 Q The question was, I repeated then and I will
7 put in the present exhibit number.

8 "Q Mr. Glasser, after you saw and examined this ten-
9 yard piece which has been received in evidence as Defendant's
10 Exhibit E now, what did you do, if anything?"

11 The answer that you gave, Mr. Glasser is
12 "I sent the one yard in, which is the same as that, to the
13 screen maker, for manufacturing of the screens from which we
14 print the goods. It is a flat bed screen operation."

15 Do you recall that question and that answer at
16 all?

17 A I don't recall it specifically. I know there was
18 a number of questions about it.

19 Q Uh huh. Would you like to reread it?

20 A No. It is in the record.

21 Q Now, by that testimony, Mr. Glasser, you indica-
22 ted that before you sent the one-yard piece to your screen-
23 maker, you had received Defendant's Exhibit E; is that cor-
24 rect?

25 MR GOLDBERG: There's no such implication in

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Glasser-cross

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the testimony, your Honor. That's a complete mischaracterization.

MR. ROBERT STOLL: No, and I shall repeat it --

THE COURT: At this point I act as the jury to determine whether there is any inconsistency here.

Now, you haven't brought that to my attention, and from this point on it becomes argumentative.

Q I would just like to continue on page 17, following that question and that answer. The next question by Mr. Goldberg to you, Mr. Glasser:

"Q Doc that mean, Mr. Glasser, that your screen printer would in effect make a copy of this design to use as a master in manufacturing larger quantities of fabric with this print?

"A Yes, that's right.

"Q Now, sir, when was the next time that you saw this design outside of your own operations?

"A I was at the Dallas market, and I saw this design made and bearing the forms.

"Q When was that, Mr. Glasser?

"A In January of this year."

Do you recall that series of questions and your answers?

A Yes, I do.

1 mpbr

2 Q You do; does that indicate to you that after
3 you sent the one-yard piece to your screen maker, the
4 next time you saw this pattern was in January at the Dallas
5 market?

6 A Yes.

7 MR. GOLDBERG: Your Honor, that's argumentative
8 again.

9 THE COURT: Yes. I'll have to make up my mind
10 whether it is inconsistent, but that is not inconsistent with
11 what he said here today. He didn't ask whether he saw it
12 again. He was asked whether he got this other sample and sent
13 it in March, I believe it was.

14 MR. ROBERT STOLL: No, your Honor, that's not the
15 point. The point is when did he receive this Exhibit E,
16 and his testimony before, your Honor, at the preliminary
17 injunction here was that he received it before he sent the one-
18 yard piece.

19 THE COURT: But the question that followed it
20 was "When did you again see it?"

21 MR. ROBERT STOLL: That is correct.

22 THE COURT: There's nothing inconsistent with what
23 he said here.

24 MR. ROBERT STOLL: That would indicate that
25 it didn't come in after the one-yard piece.

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Glasser-cross

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2 THE COURT: Well, I heard the testimony, and I am
3 familiar with the areas of testimony which you are
4 talking about.

5 Q Mr. Glasser, referring first to that one-yard
6 sample, do you know of your own personal knowledge when
7 Belle made or imported or sold or shipped that fabric?

8 A No, sir.

9 Q Do you know of your own knowledge whether he
10 made or sold or manufactured that one-yard sample before
11 or after October 20th, 1975?

12 A I don't understand that question. Please repeat
13 it.

14 THE COURT: Read the question.

15 (Question read.)

16 A No, I don't know when he made it.

17 Q Do you know of your own personal knowledge when
18 Belle made or imported or shipped or sold the second sample
19 which is Defendant's Exhibit E?

20 A Is that the ten-yard end that you are talking
21 about?

22 Q That is correct.

23 A No, I don't know anything about that.

24 Q Do you know of your own personal knowledge
25 when Belle made or imported or sold or shipped the first

mpbr

Glasser-cross

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specimen?

A There would be no way from my personal knowledge, but I heard -- no, I don't.

Q Do you know of your own knowledge whether Belle made or sold or imported or shipped the second sample, the 10-yard sample, Exhibit E, before or after October 20, 1975?

A I just answer that.

MR. GOLDBERG: Objection, your Honor. He said he doesn't know.

THE COURT: He answered that before.

Q I take it your answer would be the same with respect to Exhibit F, the 5-yard end?

A No, sir.

Q Your answer would be the same?

THE COURT: Actually that should be yes, because your answer is the same.

THE WITNESS: Oh, certainly.

I don't know whether he made it.

THE COURT: It's a double negative.

Q With respect to the third specimen, the five-yard end, Exhibit F, do you know how many hands or how many parties that specimen passed through before it reached you?

A No, sir.

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Glasser-cross

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Q Do you know who would know?

A I don't know who would know.

A I don't believe there's anybody would know,
because sometimes they go through jobbers.

Q Was that third specimen the one that you
requested your salesmen to get in connection with this
litigation?

A Yes.

Q Have you asked your salesmen where they got it?

A No, I didn't.

Q You say you have 35 to 40 salesmen, is that
correct?

A Yes, sir.

Q Do you know who it was that attached the
Belle ticket to the third five-yard specimen, Exhibit F?

A No, I don't.

Q Do you know of your own knowledge when that ticket
was attached?

A No, because I wasn't there.

Q Do you know of your own knowledge whether the
ticket was on the fabric, Exhibit F at the time the fabric was
shipped by Belle?

MR. GOLDBERG: Objection, your Honor. That's just
silly. The witness just said he wasn't there, he doesn't

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Glasser-cross

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know who put it on or who it got there.

MR. ROBERT STOLL: Then there would be no objection to his answer.

THE COURT: Well, yes, but it seems to me in this area he has clearly indicated he knows nothing about it until he got it.

That's the fact, isn't it?

THE WITNESS: Yes, sir.

THE COURT: So you don't know anything about Belle's operation?

A No.

MR. GOLDBERG: Your Honor, I have a witness from Massachusetts, who is waiting outside now, who is not employed by Malden, who was kind enough to come down.

MR. ROBERT STOLL: I don't think this is overly long, your Honor. I am trying to wrap it up.

THE COURT: Have you anything else?

MR. ROBERT STOLL: That's all.

MR. GOLDBERG: No further questions.

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Hryniewicz-direct

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EDWARD JOHN HRYNIEWICZ, called
as a witness by the defendant, having been first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Mr. Hryniewicz, are you also known as Rex?

A Yes.

Q Do you have any objection if I call you by
that?

A No. Everybody else does.

Q By whom are you employed?

A Elmtex.

Q What is their business?

A Silk screen manufacturer.

Q From time to time do you do work for Malden
Mills?

A We do.

Q Do you recall doing a job for Malden in or about
November 10, 1975?

A I do.

Q Sir, I call your attention to the piece of
fabric which has been lying on the table in front of you,
which has been marked Defendant's Exhibit E. I ask you,
sir, if you have seen that design before?

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A Yes, sir, I have.

Q Do you recall the first time you saw it?

A It arrived in the mail at the shop one day from
Malden.

Q Was it accompanied by a purchase order?

A It did.

(Defendant's Exhibit O was marked for
identification.)

Q I ask you, sir, if this appears to be a photo-
copy of a Malden purchase order and I ask you, sir, if this
is your file copy which you gave to me yesterday.

A This is.

Q Is that what you received with the piece of fabric
you are talking about?

A Yes, sir.

MR. GOLDBERG: I offer in in evidence.

MR. ROBERT STOLL: No objection.

(Defendant's Exhibit O for identification
was received in evidence.)

Q Do you recall, Mr. Rex, if you received this
purchase order and the fabric on or about the date October 21,
1975, which is on the order?

A To say that I recall exactly I wouldn't say yes or
no, but as they arrive we enter them into our books, and

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Hryniewicz-direct

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2 we also make a production order on them, and you will find
3 that we have a production order covering that with the
4 date on it.

5 (Defendant's Exhibit P was marked for
6 identification.)

7 Q Mr. Rex, I show you Defendant's Exhibit P for
8 identification. Is this the production order you are refer-
9 ring to which you gave to me yesterday?

10 A Tha's right. This is a copy of our original
11 production order.

12 MR. GOLDBERG: I offer it.

13 MR. ROBERT STOLL: Do you have a copy?

14 MR. GOLDBERG: I don't. It doesn't come out
15 on the Exerox machine. I couldn't copy it.

16 MR. ROBERT STOLL: No objection.

17 (Defendant's Exhibit P for identification
18 was received in evidence.)

19 MR. GOLDBERG: I am going to leave Defendant's
20 Exhibit P with you, Mr. Rex.

21 Q Now, sir, does that indicate when you received
22 the piece of fabric and the purchase order?

23 A Yes, it does. The date is recorded right on
24 the purchase order.

25 Q What is the date?

1 mpbr Hryniewicz-direct 229

2 A 10/22/75.

3 Q Now, sir, do you recall the next time when you be-

4 came involved with this pattern or the purchase order?

5 A Yes, there was a call shortly after -- the

6 exact date I couldn't say: I didn't record it -- but to

7 hold it for further instructions before engraving.

8 Q And who gave you those instructions?

9 A Mr. Glasser.

10 Q And did you make a notation at that time?

11 A On our original work order.

12 Q Defendant Exhibit P?

13 A It says "Hold for further instructions from

14 Mr. Glasser."

15 Q And did you make that notation at the time

16 he called you?

17 A Yes.

18 Q Is it your regular business custom, Mr. Rex, to

19 make such notations when you get such instructions?

20 A It is.

21 Q And you made this notation, then, did you, sir,

22 in the ordinary course of your business activities?

23 A Yes, it quite often happens with other people,

24 They send work in and for some reason have us hold it, so we

25 put a notation to wait for further instructions.

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Hryniewicz-direct

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Q Did you get further instructions from Malden?

A On 11/10/75, release for engraving.

Q Whom did you get it from?

A From Mr. Glasser.

Q Did you make a notation at that time?

A I entered it on the work order.

Q At the time he called you?

A Yes.

Q And that again was done in the regular course of
your business activities?

A Right.

Q Now, sir, after you got the go-ahead on November
10th, did you proceed to make screens?

A We did.

Q And did you subsequently ship those screens to
Malden?

A We did.

(Defendant's Exhibit Q was marked for
identification.)

Q Mr. Rex, I show you Defendant's Exhibit Q for
identification and ask you if this is your invoice to
Malden, which you gave me yesterday?

A It is.

Q And that covers the screens for their fabric?

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Hryniewicz-direct

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2 A It does.

3 MR. GOLDBERG: I offer it.

4 MR. ROBERT STOLL: You don't have a better
5 copy?

6 MR. GOLDBERG: I don't. I must apologize to the
7 Court for the condition of this copy. It's what Mr. Rex
8 handed me. I could not duplicate it.

9 THE WITNESS: It is difficult on a yellow
10 copy. It's our file copy of a yellow copy, and that's
11 the best I could do to get it reproduced.

12 MR. ROBERT STOLL: No objection.

13 (Defendant's Exhibit Q for identification
14 was received in evidence.)

15 Q The invoice, sir, marked Defendant's Exhibit Q,
16 is dated November 26, 1975, was that about the time you ship-
17 ped to Malden?

18 A Right.

19 Q Did you get involved at any subsequent date with
20 respect to this design?

21 A Well, several weeks later, calling on them, I saw
22 a stamp print, a strike-off that they had made. They showed
23 it to me. It quite often happens, I advise the customers to
24 see what they have done with what we have turned out. I
25 saw it at their plant several weeks later. I couldn't say

1 mpbr Hryniewicz-direct-cross 232

2 as to the date, but I make periodic deliveries myself to
3 my customers to see the samples.

4 Q Was this after October 25th?

5 A Yes, after they had received the screens.

6 MR. GOLDBERG: I have no further questions.

7 CROSS EXAMINATION

8 BY MR. ROBERT STOLL:

9 Q Were your instructions, whenever they may
10 have been received, were your instructions to copy the
11 specimen of fabrics that was given to you onto screens
12 which would match Malden's machinery?

13 A Right.

14 Q And you did that?

15 A We did.

16 Q Was there any art work that was given to you to
17 indicate modifications of the design of the one-yard sample?

18 A No. We have a standard procedure with them,
19 and that's --

20 THE COURT: Wait a minute. "No" answers the
21 question. Wait for the next question.

22 THE WITNESS: Oh, I am sorry.

23 Q You were given nothing --

24 MR. ROBERT STOLL: Strike that.

25 Q Were you given anything other than the one-yard

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Hryniewicz-cross

233

sample and the purchase order to instruct you on how to make the screens?

A Yes, there is. On their purchase order it states about the specification, that it has to fit into their machine.

THE COURT: Strike that. Listen to the question and you will see that that was not contained in the question. Read the question.

(Question read.)

A Yes.

Q What were you given?

A I was given the instructions on their purchase order --

Q No. Excluding the purchase order, sir, and excluding the one-yard sample, were you given anything else to assist you in making the screens?

A No, just this particular piece of goods.

Q When you say this particular piece of goods, you are pointing to Exhibit E, but I presume you mean a piece of goods similar to that?

A Similar. I can't identify it as the exact piece of goods, but that's the pattern that we re-engraved or engraved.

Q Do you retain any portion of the samples

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Hryniewicz-cross

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that are sent to you from which you manufacture screens?

A No. We return it to the customer.

Q What do you return to the customer?

A We return the original art work or swatches or whatever we are working from, and the screens.

Q And in this particular case were you given a one-hard specimen, is that correct?

A Yes.

Q And you returned that one-yard specimen, did you?

A Yes. It was returned to the customer.

Q Do you return it with the screens, is that your customary practice?

A That is right.

Q How long does it normally take your company to manufacture screens once you receive a specimen?

A Normal delivery is two to three weeks depending on the intricacy of the pattern, inasmuch as there's so much handwork, some of it comes through faster, some takes a little longer, depending on the pattern.

Q By a little longer, can it take up to a month?

A It can take up to a month.

Q How long does it normally take you to get started on making screens after you receive a purchase order and specimen to go along with it?

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Hryniewicz-cross

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2 A That depends on the situation. Sometimes if a
3 customer requests a special return and we are in a position
4 to do we will put it into work immediately. It depends
5 entirely on the amount of work we have in the house.
6 If we have schedules, work scheduled for a week or two, we
7 may not start it for two weeks. We may not start it for
8 a week. But if we get special requests that something is
9 needed in a hurry, and we are in a position to do it we will
10 get started immediately.

11 Q Is Malden a good customer of your company?

12 A Yes; he is.

13 Q Approximately what percentage of your business is
14 done with Malden?

15 A Now, I am just guessing. I would say approx-
16 imately 20 percent.

17 Q That is a major portion of your business, isn't
18 it?

19 A No, it is not a major portion.

20 Q Well, it is not a majority, but it is a big por-
21 tion.

22 MR. GOLDBERG: Your Honor, he stated what the
23 proportion was.

24 THE COURT: Well, he gave it. I know what a
25 hundred percent is, and I know what 20 percent is.

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Hryniewicz-cross

236

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2 Q If Malden were to give you a rush order, would you
3 ordinarily work on it immediately?

4 A Yes, I would.

5 Q By "immediately" --

6 A By immediately I mean the first girl that was
7 available after finishing with whatever job she was paint-
8 ing, it would go on that day, or if it is something that
9 they really requested a special rush and I could stall some-
10 thing else off and rush it out, I would do it.

11 Q Do you recall whether the order for the screens
12 in question was a rush order?

13 A Yes, sir. It is ASAP -- as soon as possible.

14 Q You are pointing to Exhibit P which is --

15 A ASAP. As soon as possible.

16 Q I also hand you Defendant's Exhibit K, the purchas
17 order itself, and ask you whether that indicates it is a
18 rush order.

19 A Right here.

20 Q Does it indicate it's a rush order?

21 A Right.

22 Q Handing back to you Defendant's Exhibit P,
23 your work order or whatever you call it, does that indi-
24 cate the date on which you began manufacturing the screens?

25 A "Release from engraving 11/10". I will not

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Hryniewicz-cross

237

guarantee that it was started on that date. That's the instruction I got. But as a rule, within a day or so of that. When it was released we immediately put it into work for them.

MR. ROBERT STOLL: That is all.

MR. GOLDBERG: I have no further questions, your Honor.

THE COURT: All right.

You are excused.

THE WITNESS: I am through for the day or entirely?

THE COURT: Yes, you are.

(Witness excused.)

MR. GOLDBERG: I call Mr. Sanford Levine, your Honor.

THE COURT: Is this your last witness?

MR. GOLDBERG: Yes, sir.

THE COURT: Do you have any rebuttal witnesses?

MR. ROBERT STOLL: Just the deposition I wanted to read.

THE COURT: All right.

1 mpbr Levine-direct 238

2 S A N F O R D L E V I N E, called as a witness
3 by the defendant, having been first duly sworn,
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. GOLDBERG:

7 Q Mr. Levine, by whom are you employed?

8 A Malden Mills.

9 Q What is your position there, sir?

10 A I am the national sales manager of the uphol-
11 stery division.

12 Q Mr. Levine, I call your attention to the piece
13 of fabric which is lying on the table in front of you which
14 has been marked Defendant's Exhibit A and ask you, sir, if you
15 recall when you first saw the design embodied in that fabric.

16 A Probably at the Dallas market in July of
17 1975.

18 Q You saw it then, sir?

19 A Yes, I did.

20 Q Did you see it -- I'm sorry, excuse me --

21 Q When was the next time you saw it, sir?

22 A The next time I saw this fabric was at the
23 October market, in High Point, in 1975.

24 Q Did there come a time when you were asked to
25 obtain any samples of that fabric by anybody at Malden?

1 mpbr Levine-direct 239

2 A Yes, therewas.

3 Q Who made that request of you?

4 A Mr. Glasser.

5 Q Milton Glasser?

6 A Yes, Milton Glasser.

7 Q What what request did he make of you and when

8 did he make it?

9 A It was just prior to the October market in 1975 and

10 he called me and asked me if I could obtain a fairly good

11 sized piece of this fabric.

12 Q And can you place that in time more specifi-

13 cally?

14 A Yes. It was just prior to my leaving for the

15 market. It would have to be around October 21st or October

16 22nd.

17 Q 1975?

18 A 1975.

19 Q Uh huh. Did you then give instructions for

20 that to be obtained?

21 A Yes, I did.

22 Q Did you personally receive any sample of that

23 thereafter?

24 A No, I didn't.

25 Q Did you give instructions to your salesmen

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Levine-direct

240

that they were to send it directly to Mr. Glasser?

A Yes, I did.

Q Now, sir, have you ever heard of a man named Myron Fogel?

A Yes, I have.

Q Who is Myron Fogel?

A Myron Fogel is a salesman of upholstery fabrics.

Q Did he ever work for Malden?

A Not as such. He worked for Weaver-Morgan. This is the selling agents for Malden, so that in essence he worked for Malden.

Q What period of time did that cover?

A He worked from December of '74 through April of '75.

Q During that period of time did you have contact with him?

A Yes, I did.

Q Many contacts or a few or --

A Very few.

Q Very few?

A Very few.

Q During any of your contacts with him did he ever give you a sample of fabric containing the design indicated on the sample of fabric in front you, which is

1 mpbr Levine-direct-cross 241

2 Defendant's Exhibit E?

3 A No, he didn't.

4 Q Did Mr. Fogel ever give you a sample of any
5 fabric?

6 A No, he didn't.

7 MR. SAMUEL STOLL: May we have a moment, your
8 Honor?

9 THE COURT: We will take a 5-minute recess.

10 (Recess.)

11 MR. ROBERT STOLL: I have no questions of
12 this witness, your Honor.

13 THE COURT: You may step down.

14 MR. GOLDBERG: Your Honor, hold it just a
15 second, Mr. Levine.

16 During the recess, looking over my notes I noticed
17 there was one matter which Mr. Glasser had said he didn't
18 have personal knowledge of concerning sales, I would like
19 to ask him.

20 CROSS EXAMINATION

21 BY MR. ROBERT STOLL:

22 Q Mr. Levine, do you know when Malden began to
23 sell fabric containing the subject design?

24 A Yes.

25 Q When was that, sir?

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Levine-cross

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2 A Approximately January 15, 1976.

3 MR. GOLDBERG: No other questions.

4 THE COURT: All right. You are excused.

5 MR. ROBERT STOLL: In fact, may I adopt Mr. Gold-
6 berg's procedure? I do have one question of that witness on
7 the same line.

8 Q May I ask you, sir, whether you are continuing
9 to sell this design?

10 A Yes, we are.

11 (Witness excused.)

12 THE COURT: Is that the defendant's case?

13 MR. GOLDBERG: Yes, your Honor.

14 THE COURT: Any rebuttal?

15 MR. ROBERT STOLL: Yes, your Honor, I would like
16 to read excerpts from the deposition of Myron A. Fogel,
17 taken June 29, 1976, pursuant to notice in this case.

18 I may as well identify it the way as it was done
19 by the deposition.

20 "Q Will you state your name for the record, please?

21 "A Myron A. Fogel.

22 "Q Where do you reside?

23 "A 4780 Champion Court, Greensboro, North Carolina.

24 Q Mr. Fogel, what is your business?

25 "A I am a salesman in the upholstery fabric

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2 business.

3 "Q How long have you been in the textile business?

4 "A I have been in it since I've been sixteen
5 and a half years old, and I will be fifty-two in another
6 couple of months.

7 "Q In what capacity have you served in that
8 industry?

9 "A Starting as a shipping clerk, salesman and
10 all other types; whatever else is involved in doing my
11 job.

12 "Q Have you ever been employed by Malden Mills
13 Industries, Inc., or by their sales representative,
14 Weavers-Morgan of High Point, North Carolina?

15 "A Yes.

16 "Q By whom?

17 "A By Weavers-Morgan, who is the selling agent
18 or who has the sales agent for Malden Mills, who might be
19 Malden Mills today.

20 "Q Selling agent for what industry? In what
21 industry?

22 "A Upholstery fabrics.

23 Page 7, line 24 -- I beg your pardon, I would
24 like to continue where I left off.

25 "Q When were you in the employ of Weavers-Morgan?

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"Fogel

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"A Let me -- I left them July, some time around 1975. So I suppose for about several months before that. I don't know the exact time Maybe seven, eight or nine months.

"Q Your affidavit of April 28, 1976 says that for a period of about one year --

"A One year --

"Q --ending in April of 1975 you were a salesman in the employ of WEavers-Morgan. Do you recall what month it was that you actually left their employ?

"A Yes. In checking, I left them officially July 1st, I believe it was.

"Q 1975?

"A 1975.

"Q Prior to the time you left them, had you ever seen a fabric, which I show you now and which we have identified as Defendant's Exhibit B for identification (handing)."

Interrupting the record, that specimen of fabric has been identified has in court as Exhibit B, and it is now Defendant's Exhibit E.

MR. GOLDBERG: The ten-yard piece, Mr. Stoll. There appears to be a difference of opinion.

MR. ROBERT STOLL: The fabric which was

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"Fogel

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identified by you as Defendant's Exhibit B. There is no difference of opinion.

MR. GOLDBERG: We don't know that your Honor, but it's not significant.

MR. ROBERT STOLL: "A Yes. This fabric was given to me by a customer in North Carolina. At the time he liked it and we discussed the fabric; if it could be manufactured or made.

"Q By whom?

"A By Malden Mills. The particular customer didn't like certain things about it, changed the position of the design or something like that, where it could be used more practically, because this particular design, the way it was shown to me, was very difficult for him to manufacture furniture with" --

MR. GOLDBERG: Your Honor, I am sorry I have to interrupt. I understand now from my associate, Mr. Kinzler, who was actually at the deposition of Mr. Fogel that neither of Defendant's Exhibits E or F were there. In fact, they were residing in my office at that time.

MR. ROBERT STOLL: May I remind counsel that he supplied to me, perhaps at our request, I don't know, specimens of each of these rolls following the hearing on

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"Fogel

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the preliminary injunction and that he marked the specimens which he delivered to me.

THE COURT: I think that is so, but the record doesn't indicate up to this point. What appears in this courtroom and what has been identified as a specimen from that exhibit and not the whole roll.

MR. GOLDBERG: I think that they should be produced, your Honor.

THE COURT: Well, who has it?

MR. GOLDBERG: They have. It was their deposition. I have no idea what you used. I cut something off and gave it to you. I have no idea if that's what you used at Fogel's deposition.

MR. SAMUEL STOLL: Your Honor, we will send for it. It was shown to Mr. Kinzler and bore a label indicating that it came from Exhibit B.

THE COURT: I will take it subject to you seeing that and satisfying yourself that it is what it is. I don't imagine there will be any question.

MR. ROBERT STOLL: In fact, the idea was Mr. Goldberg's own Exhibit B. I was interrupted in my answering of the question. The question was:

"Q By whom?

"A By Malden Mills. The particular customer

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"Fogel

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2 didn't liek certain things about it, changed the
3 position of the design or something like that, where it
4 could be used more practically, because this particular
5 design, the way it was shown to me, was very difficult for
6 him to manufacture furniture with, and maybe we could change
7 something.

8 "I told him I would take it and have it looked
9 into.

10 "Q Did he identify the name of the manufacturer
11 of that fabric?

12 "A I think he told me it was a Belle fabric.

13 "Q How big a piece was it?

14 "A I believe it was a -- well, I must have asked
15 for a full width, which is a 54 width, and I must have
16 asked for a repeat, which I would say is approximately
17 three-quarters of a yard, or a yard, or something like that.

18 "Q What did you do with the fabric?

19 "A I told him that I would take it up with Malden
20 Mills and my people. I brought the sample back to
21 High Point and it was given to Sandy Levine on one of his
22 trips to the warehouse in High Point.

23 "I showed it to him, explained what this particular
24 customer wanted, and he took the sample for me, and that
25 was it." From me is probably correct.

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"Fogel

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"Q How long after the sample was handed to you by your customer did you hand it to Sandy Levine?

"A Oh, it could have been within a couple of weeks, or something like that; a week or ten days. The exact time, I couldn't say. He had to be on a visit to the office.

"Q But you were still employed by Weavers-Morgan at that time?

"A I was employed by Weavers-Morgan, right.

"Q Do you recall whether he at that time was employed by Weavers-Morgan or by Malden?

"A He was a sales manager of the Malden Mills Upholstery Division.

"Q When you say Sandy Levine, what is his name, do you recall?

"A Sandy, Sanford.

"Q Sanford?

"A Sandy Levine, Sanford Levine."

MR. GOLDBERG: Your Honor, I am going to request at this time that counsel continue reading where he left off, pursuant to Rule 106 of the Federal Rules of Evidence which require that a party continue reading where there is pertinent information immediately following the point where he left off.

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"Fogel

2 MR. ROBERT STOLL: I would be glad to read it,
3 but I am sure counsel could do it for me. There is no
4 question that he could read this as well as I can.

5 THE COURT: But the rule as it now reads is that
6 matters that are contemporaneous to what is being read
7 in the deposition should be read at the same time. I don't
8 care who reads it but it should be read now.

9 MR. ROBERT STOLL: "Q Do you know what he did
10 with it thereafter?

11 "A After I showed him what the customer wanted,
12 we discussed changing the design, and a few other things
13 concerning the fabric. He said he would get back to me
14 and that it would be taken care of.

15 "Q And that was the last you heard of it?

16 "A And that was the last I heard of it."

17 The next question is on a slightly different
18 subject, and I would like to ask Mr. Goldberg whether he
19 would like to read it or whether he would like me to con-
20 tinue. I don't think it is necessary.

21 MR. GOLDBERG: I agree. Your Honor, this is
22 another part of the transcript of Mr. Fogel's deposition --

23 MR. ROBERT STOLL: There is more that I intend
24 to read. I am constantly being interrupted.

25 "Q Have you ever heard of a company called Greeff

1 mpbr

"Fogel

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2 Fabrics, Inc.

3 "A Yes."

4 MR. GOLDBERG: I am going to object to this
5 question now. I don't think whether Mr. Fogel has heard
6 of Greeff Fabrics has any relationship to this lawsuit unless
7 Mr. Fogel can testify that he had seen this design with a
8 Greeff copyright sign on it. Mr. Fogel gave no such
9 evidence.

10 THE COURT: I will allow it. Overruled.

11 MR. ROBERT STOLL: "Q Have you ever heard
12 of a company called Greeff Fabrics, Inc.?"

13 "A Yes. To me, Greeff Fabrics is one of what we
14 called an uptown trade. They sell to decorators, very high
15 style, all types of fabrics.

16 "Q Did they also sell to upholstery furniture
17 manufacturers?

18 "A I believe now they do. I believe now."

19 Skipping to page 12, line 17:

20 "Q Do you know what piece tickets are used for?"

21 MR. GOLDBERG: Objection, your Honor. This
22 witness, first of all, is not at all qualified as an expert
23 in regard to what piece tickets are.

24 Second of all, my understanding of Rule 32 of
25 the Rules of Civil Procedure is that a deposition of a

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"Fogel

2 witness who is beyond a hundred miles can be used but to be
3 used sparingly, because it is desirable that a witness appear
4 in open court so his credibility can be assessed by the Court.

5 Now, I am sure there are enough experts in New
6 York City that could be called here so we don't have to use
7 Mr. Fogel's expert testimony of what a piece ticket is.
8 I submit that his testimony can only be used for facts
9 within his personal knowledge.

10 MR. ROBERT STOLL: That objection wasn't
11 raised at the deposition. The fact is that Mr. Fogel is more
12 than one hundred miles from the courthouse, as far as we are
13 aware. He is as accessible to the plaintiff as he is to
14 the defendant. He is an employee of an associated company of
15 the defendant, and as far as his not being here is concerned,
16 the defendant has subpoenaed some witnesses in this lawsuit.

17 I see no reason why the presence of Mr. Fogel, why
18 if desired, the defendant could not also have subpoenaed Mr.
19 Fogel.

20 THE COURT: There is no duty or obligation on
21 his part to subpoena anyone at this point. Either side
22 has the right to do it.

23 MR. GOLDBERG: Your Honor, I would just like to
24 respond by saying we objected all over the record to
25 Mr. Fogel attempting to be used as an expert. In any event,

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2 such objections are reserved to the trial. I am not
3 objecting to the form of the question. I am objecting to
4 the attempt to use Mr. Fogel as an expert.

5 THE COURT: The only thing you waive as
6 far as the questions are concerned is to the form of the
7 question.

8 MR. GOLDBERG: Exactly.

9 THE COURT: If that weren't the case, then there
10 would be many difficulties involved. When he objects to the
11 form of the question, of course, you can then change the form
12 of the question and ask the question in proper form, but
13 that's not the point here. The point here is that you are
14 attempting, as I see it, to get expert testimony from a
15 witness who hasn't been qualified up to this point as an
16 expert. He is a salesman in this particular area and
17 that's about as much as we know about him. At the present
18 time he is not employed by them.

19 I don't know that they have control over him in
20 any way.

21 MR. ROBERT STOLL: I am not suggesting --

22 MR. GOLDBERG: Your Honor, as far as control
23 is concerned, Mr. Fogel will put that in an affidavit for
24 the plaintiff on their preliminary injunction hearing.
25 Since he was fired by Malden, we have no control.

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2 THE COURT: That's not in the record, and I will
3 disregard that. As far as giving an opinion as to what a
4 piece label contains or what it does, I would sustain an
5 objection as to that.

6 MR. GOLDBERG: Thank you.

7 THE COURT: In the action of it being shown in the
8 record that he was qualified as an expert.

9 MR. ROBERT STOLL: I will read just two
10 questions and two answers on the question of qualification.

11 "Q Mr. Fogel" -- Page 12, line 12 -- "Mr. Fogel,
12 do you have any experience with the use of piece tickets in
13 your industry?

14 "A Yes, absolutely.

15 "Q How long have you had such experience?

16 "A Ever since I started as a shipping clerk."

17 And I refer your Honor back to the first part
18 that I quoted, that he started when he was 16-1/2 years old,
19 he would be 52 in a couple of months, and he started as a
20 shipping clerk, therefore, when he was 16-1/2 years old.
21 That has already been read into the record.

22 MR. GOLDBERG: Your Honor, in response to
23 I would like to read briefly from page 82 of the record on
24 the cross examination of Mr. Fogel, starting at line 11, page
25 82:

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"Fogel

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"BY MR. KINZLER:

Q How many manufacturers of upholstered furniture have you worked for?

"A Not furniture; fabrics I handle.

"Q No, furniture. That is what I said.

"A I don't work for any manufacturer of furniture.

"Q Have you ever?

"A No.

"Q Have you ever worked for any consumers of yardage that was produced by Malden or any other mill?

"A No, I just represented mills, fabric companies and maybe a converter."

We respectfully submit that Mr. Fogel is obviously not an expert in this area. We further submit that even if he were, Rule 32 doesn't permit the deposition of an expert witness in this matter.

THE COURT: Well, I will have to read Rule 32 again. Let me see where we are.

MR. ROBERT STOLL: If your Honor please, the portion just read by Mr. Goldberg indicates that Mr. Fogel doesn't know how to build furniture.

MR. GOLDBERG: Your Honor, Rule 32(a), the end of 3, where it refers to the due regard for the importance of presenting the testimony of witnesses orally in open

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"Fogel

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2 court: We submit, sir, the deposition of an unavailable
3 witness is to be used sparingly and for a limited purpose,
4 because such witness may have facts within his knowledge
5 which the Court needs to make a decision.

6 MR. ROBERT STOLL: Mr. Goldberg's office had an
7 opportunity and did in fact cross examination this witness.

8 THE COURT: That's not the point. The point is
9 whether you can get an expert in here by --

10 MR. GOLDBERG: Your Honor, the rule doesn't
11 directly refer to expert testimony, but do refer specifically
12 to the importance of presenting the testimony of witnesses
13 orally in open court, and the permission to use the
14 deposition of a witness beyond a hundred-mile limit is obviously
15 an exception to the ordinary rule, and we submit that that
16 exception should only be permitted when that unavailable
17 witness has facts at his command that the Court needs to make
18 a decision. But as to an expert witness, when they are
19 in New York City, when they can get experts all over the
20 place, surely they should not be permitted to operate
21 through the deposition of a witness that they obviously
22 control.

23 MR. ROBERT STOLL: May I read a few more questions
24 and answers on the subject of whether this witness might
25 indeed be qualified? I am reading now from Page 15, line 6:

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2 "Q What has your experience been with the use
3 of fabrics by an upholstery manufacturer? How long have
4 you catered to that industry?

5 "A To the furniture manufacturers?

6 "Q Yes.

7 "A Since I have been twenty years old; for thirty
8 years.

9 "Q Could you put on the record a statement of your
10 experience with them; the extent of your experience and what
11 you know about them?

12 "A Well, I started selling furniture manufacturers
13 when I was around twenty years old, and I have been selling
14 them ever since. I have been in many cutting rooms and
15 seen goods handled in the plant in many different plants
16 around the country."

17 THE COURT: All right. I will tell you, you
18 read that in, and I will reserve decision on whether or not
19 I will allow it.

20 MR. ROBERT STOLL: Very good, sir. I might say
21 if Mr. Goldberg is so insistent on having Mr. Fogel give
22 oral testimony, I see no reason why he didn't subpoena
23 him.

24 THE COURT: Because it wasn't to his advantage
25 to do so. Why does he have to bring somebody here who

1 mpbr "Fogel 257
2 he feels is going to have to testify against him? He is
3 the defendant in this lawsuit. The burden of proof
4 is on you.

5 MR. ROBERT STOLL: On the contrary, your Honor.
6 In this case the burden of rebutting the prima facie
7 case, copyright validity and infringement is on the de-
8 fendant.

9 MR. GOLDBERG: Oh, no. The burden of proof
10 never shifts.

11 THE COURT: The burden of proof starts with
12 you.

13 MR. GOLDBERG: And never shifts.

14 MR. ROBERT STOLL: This is on our rebuttal.

15 THE COURT: All right. I haven't got the rule
16 here. I will reserve on this.

17 You read in whatever you think you want to read
18 in on this question of tickets and I will reserve on the
19 decision of whether it will be allowed.

20 MR. GOLDBERG: Your Honor, I understand the ruling
21 as far as Rule 32 is concerned, but we still maintain that
22 this man has never worked for a furniture manufacturer;
23 he has no understanding of what they do with piece tickets
24 on fabric. It is incredible that he should be used
25 as an expert when this city is teeming --

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"Fogel

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2 THE COURT: Well, a fellow in this industry must
3 have had thousands of these piece tickets and must have
4 had some dealing with piece tickets as he went along,
5 and I don't see that it should be disallowed for that
6 reason alone. But in any event, I will take this, and I will
7 rule on it before I decide the case. I will reserve decision
8 on it.

9 By the way, while we are talking about reserving
10 decisions, those two bolts that you offered and which I
11 accepted subject to hearing further testimony on them and look-
12 ing into them further, the one which has the copyright
13 on it and which we didn't -- I think they are 6, 7, 9 and
14 10. In any event, those that I reserved decisions on
15 I sustain the objection to those, and now the only thing I am
16 reserving decision on is this particular aspect here.

17 MR. GOLDBERG: Your Honor, I am not sure I
18 follow. When we were speaking before of Defendant's
19 Exhibits E and F --

20 THE COURT: No, no. Not E and F. The other
21 alleged knock-downs, 6, 7, 9 and 10, the ones that
22 I reserved decision on. I sustain the objection, with an
23 exception to the plaintiff.

24 Now, the only thing I am reserving decision on
25 at this point is this particular area here concerning the

1 mpbr

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2 tickets. I have reserved decision on nothing else during
3 the course of the trial.

4 MR. ROBERT STOLL: Page 12, line 17:

5 "Q Do you know what piece tickets are used for?

6 "A Definitely. To identify a piece of fabric.

7 "Q Is a piece ticket a temporary sort of means
8 for identifying fabric, or is it permanent, or how would
9 you characterize it?

10 "A Well, piece tickets have two or three different
11 purposes. When a piece of goods comes in from a mill,
12 say to a converter or importer, he puts an identifying ticket
13 with yardage, color and everything else like that; information
14 to identify the piece. When he ships the piece, that
15 ticket remains with the piece of goods until it reaches
16 its destination or the consumer, whoever he is selling it
17 to.

18 "Q Suppose he sells it to the upholstery
19 manufacturing industry?

20 "A That ticket remains on the piece of goods
21 until the manufacturer gets it, and it remains on the bolt
22 until he uses it, usually.

23 "Q How long, generally, is a bolt of goods
24 sold for? Take Malden goods.

25 "A The length?

1 mpbr "Fogel 260

2 "Q Yes, the length.

3 "A I would say anywhere between fifty to sixty

4 yards.

5 "Q Say a furniture manufacturer removes ten yards

6 from that particular bolt. Does he remove the ticket

7 with it?"

8 Mr. Kinzler interjects an objection, and the

9 question which follows refers directly to --

10 MR. GOLDBERG: I would like the objection to be

11 read.

12 MR. ROBERT STOLL: The question which I just

13 read wasn't answered in view of the objection.

14 MR. GOLDBERG: We have an objection pursuant

15 to Section 106 of the Rules of Evidence, and it immediately

16 follows.

17 MR. ROBERT STOLL: "MR. KINZLER: Mr. Stoll,

18 I have to object again. We are going so far afield. We

19 are taking speculation upon speculation, supposition upon

20 supposition.

21 "If you have a question, why don't you ask

22 him? If you have a piece ticket, why don't you show it

23 to him and ask him what he did.

24 "If you have a question relevant to the

25 lawsuit, let's get on with it.

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"Fogel

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"Q In view of what was just stated, and I must agree that you have not seen every piece ticket used by every manufacturer of fabric throughout the world, nor have you been in the plant of all that used fabrics, so I am aware of that and I think you are.

"What has your experience been with piece tickets and their use in the plants of furniture manufacturers?

"A I would say normally a piece of goods comes in and is checked in by the piece ticket.

"Q By the what?

"A Piece ticket."

Mr. Kinzler has an objection, again, your Honor, a short one.

"I must object again. We have not established that this person ever worked for a furniture manufacturer, which is what your question asked."

"MR. STOLL: Again, a good objection.

"Q What has your experience been" -- I read that to your Honor. The question was experience, since he has been 20 year old and a record of his experience.

Leaving for a moment the testimony on piece tickets and returning to the question of that first one-yard specimen, this is in cross examination by Mr. Kinzler,

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"Fogel

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2 beginning page 54, line 16:

3 "Q When did you get this fabric from the
4 customer?

5 "A I would say, oh, if I left there in July,
6 a few months, a month or so; six weeks or seven weeks.
7 I don't know. A couple of months before I left there
8 some time.

9 "Q You specifically stated, and again I refer
10 to your affidavit, that this incident occurred in April
11 of 1975.

12 "A April, May, June, something.

13 "Q Which is it?

14 "A April, roughly.

15 "Q You make the simple statement, that occurred
16 in April of 1975?

17 "A April.

18 "Q Now, you are saying April?

19 "A I am saying within that time frame. I can't
20 pin it down to a particular day.

21 "Q I am not asking you for a day.

22 "You said April?

23 "A I will stand by what I said.

24 "Q Fine. We shall assume it was April.

25 "Who asked you to get this fabric?

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"Fogel

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"A Nobody asked me to get it.

"Q Why did you get it?

"A A customer asked me, showed me a fabric and he didn't like something about that particular fabric.

"Q What didn't he like?

"A In this particular case, it was the way that the design was set up. It was a difficult thing for him to cut, and I said, let me see if I can work something out for you. He gave me this approximately one yard sample, or something like that, in this very color (indicating).

"MR. STOLL: Pointing to Defendant's Exhibit B.

"A In this very color, and we had discussed changing a few of the motifs to make it easier for him to use.

"I, in turn, turned the sample over to Sandy Levine.

"Q Excuse me?

"A I turned the sample over to Sandy Levine and told him what this particular customer would like, and he assumed me it would be taken care of.

"Q Did you pay for this sample?

"A Did I pay for it? No.

"Q Was this normally part of your job?

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"Fogel

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"A I would say in the course of events, it comes

3

up occasionally. If somebody wants something and you

4

think you can do it for them, you do it for them. This

5

increases your sales.

6

"Q You said you turned this over to Mr. Levine,

7

Sandy Levine.

8

"When was that?

9

"MR. STOLL: The witness has already testified

10

to that several times.

11

"MR. KINZLER: No, he has not.

12

"MR. STOLL: All right. I think he did,

13

but if you want it again, he may answer it.

14

"MR. KINZLER: I would like it again.

15

"A I would say about three or four weeks after

16

that. I don't know exactly.

17

"Q Would you please describe with as great detail

18

as possible the alleged sample that you got from this

19

unidentified customer?

20

"A This is a Jacquard.

21

"Q This, what is this? I want the sample that

22

you got. The one you testified you received. Describe

23

that.

24

"A The one yard cut was a bluish, and well,

25

rust and brown color squares, many other different types

1 mpbr

"Fogel

2 of motifs.

3 "Q Could you describe it without looking at it?

4 "A I could describe it in my sleep.

5 "Q Why were you referring to Exhibit B?

6 "A Because I know that that is it."

7 MR. GOLDBERG: Please continue.

8 MR. ROBERT STOLL: I am.

9 "Q What type of fabric is that?

10 "A That's a velvet.

11 "Q Is that different from a Jacquard?

12 "A A Jacquard is a pattern of fabric. Jacquard
13 means pattern fabric.

14 "Q The sample you picked up, was that a Jacquard?

15 "A Yes, it was that fabric (indicating).

16 "Q And you gave it to Mr. Leviné?

17 "A Gave it to Sandy Levine.

18 "Q What happened to it after that?

19 "A I have no idea.

20 "Q You have no idea what happened?

21 "A He took it in his possession and that's the
22 last I saw of it.

23 "Q You never heard anything more about the
24 fabric?

25 "A From him?

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"Fogel

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"Q From anybody.

"A To the best of my knowledge, I never heard anything more about it."

On page 79 --

MR. GOLDBERG: Your Honor, I would move to strike all of this testimony as to this alleged giving of a sample to Sandy Levine in April or so of 1975. It is totally irrelevant to any issue in this lawsuit. There has been testimony by Mr. Levine that he did see the fabric some time around the spring of '75. So what is this? I mean they saw it or they didn't see it. Mr. Fogel in the testimony that Mr. Stoll just read admits he didn't know what happened to it. He also suggested there -- Mr. Fogel -- that he had said certain changes had been made. The Court has seen changes were not made. What conceivable bearing has it got in this lawsuit?

THE COURT: I will deny that application at this time.

MR. ROBERT STOLL: Returning once again to the piece ticket matter, I believe I read in connection with the experience that Mr. Fogel had in the industry from Page 15, and my recollection is that I stopped reading at line 20.

I would like to continue for just a few more

1 mpbr

"Foqel

2 lines, 21:

3 "Q Have you had contact with many furniture
4 manufacturers using upholstery fabrics?

5 "A That is the only contact I had; the furniture
6 manufacturer who uses upholstered fabrics.

7 "Q You are presently located in Greensboro?

8 "A Greensboro, North Carolina.

9 "Q Are there any manufacturers of upholstered
10 furniture in that area?

11 "A This area is the center of the upholstery field,
12 North Carolina and the adjoining states; the local area within
13 a two, three, four hundred mile radius.

14 "Q And that is the sphere of your activities?

15 "A No. I covered accounts in the southwest,
16 middle west.

17 "Q Are we still talking about furniture
18 manufacturers?

19 "A Furniture manufacturers.

20 "Q Would you consider yourself to be knowl-
21 edgeable on the use of piece tickets in the furniture
22 industry?

23 "A Yes, I think so.

24 "Q I hand you a sheet which bears the following
25 notation, 'Exhibit B,' and attached to it is a yellow card.

mpbr

"Fogel

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I ask you if you recognize what that yellow card is.

3

"A This is a piece ticket from Belle Fabrics.

4

The pattern on it is Camelot, and it tells where the fabric

5

was made, which is a very normal ticket."

6

For the record, that piece ticket was marked as

7

Fogel Exhibit 1 in the deposition, and it is so marked on the

8

sheet that carries the piece ticket.

9

I offer this in evidence as Plaintiff's

10

Exhibit 13.

11

MR. GOLDBERG: On what page is that referred to?

12

THE CLERK: Any objection on this, Mr. Goldberg?

13

MR. GOLDBERG: There may be in a moment.

14

(Pause.)

15

MR. GOLDBERG: If your Honor please, the witness,

16

Mr. Fogel, didn't testify in any way that he had ever seen a

17

piece ticket before or had any knowledge of where it came from

18

or how it was prepared or anything else. What value it

19

is for him to identify it, I can't conceive, and I object

20

to it.

21

MR. ROBERT STOLL: At the time it was offered

22

at the deposition there is this comment at page 18, line 22:

23

"MR. KINZLER: I have no objection to the

24

introduction of the piece ticket.

25

"MR. STOLL: Thank you.

mpbr

"Fogel

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"We will mark this as Fogel Exhibit 1."

MR. GOLDBERG: Your Honor, at the beginning of this deposition we reserved all rights to make any objections except as to form. That's the only thing we waived. We are now objecting to it on the grounds of relevancy.

THE COURT: What's the relevancy of this to this dispute?

MR. ROBERT STOLL: First of all, if we have testimony of Mr. Fogel with respect to it it ought to be marked. Secondly, there is testimony by Mr. Fogel which identifies the practice to Mr. Fogel's own knowledge of the use of piece tickets, and he so testified with reference to this proposed exhibit.

THE COURT: I will allow it. Overruled.

(Plaintiff's Exhibit 13 for identification was received in evidence.)

MR. ROBERT STOLL: A portion of Mr. Fogel's testimony with respect to this Exhibit 13, beginning on Page 22, line 24:

"Q What happens when the upholstery manufacturer cuts only a piece of goods off the bolt? What happens to the ticket?"

MR. GOLDBERG: Objection, your Honor. This witness again admitted that he had never worked for an upholsterer.

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"Foqel

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manufacturer.

His only knowledge was what mills do, what factories do. How can he answer the question of what a furniture manufacturer does?

THE COURT: I thought I ruled on that, and I will allow it.

Overruled.

MR. ROBERT STOLL: "A The ticket would remain with the piece of goods, in most cases.

"Q Is there anything else done to the piece ticket after the small piece or cut is removed from the bolt?

"A To the piece ticket?

"Q Yes. Is there anything written on it?

"A There could be yardage, how many yards were cut from the bolt, to keep in inventory control.

"Q When is the piece ticket actually discarded?

"A I would say when the piece is used up."

Mr. Kinzler then interposes an objection, which I could read, if necessary, but that is the end of the direct examination of Mr. Foqel.

Continuing with testimony with respect to the piece ticket, this now being on cross examination, page 79, line 22:

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"Fogel

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"Q I refer now to Plaintiff's Exhibit 1 for identification, which we have called a piece ticket."

That is now Exhibit 13.

"This piece ticket has printed on it 'Belle Fabrics, Inc.' Have you ever seen any piece similar to this one from Belle Fabrics?

"A Yes, on goods that I have seen at customer shows.

"Q When you say customer --

"A Furniture manufacturers.

"Q The users of the product?

"A The users of the product.

"Q These piece tickets have a number of categories on it?

"A Yes.

"Q I take it when you see these piece tickets all of these categories would be filled out, or whatever is necessary?

"A Normally, yes. Normally they would fill in the color, the yardage of the piece, the piece number and the customer's order number.

"Q Where are those piece tickets affixed?

"A The end -- it's affixed to one end of the piece of yardage, or maybe some mills put it on tube, but usually the end of the piece, the end of the length of the piece."

1 mpbr

"Fogel

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2 I believe there is an error there.

3 "Q What happened to the piece cut if, let's say,
4 they cut ten yards off the piece?

5 "A Normally it would be left on the piece.

6 "Q On the piece?

7 "A The piece that is left, the remainder.

8 If it is a fifty yard piece and they take off then, we put
9 it back on the piece to identify the piece."10 MR. GOLDBERG: Your Honor, there again I have
11 to object. The witness says "We put it on." That's
12 incorrect, clearly, based on the fact that he never worked
13 for a plant. He worked for fabric houses.14 THE COURT: I assume he meant the man using
15 the roll would do it. But I will allow it to stand as it
16 is, in any event.

17 We will recess now until 2:15.

18 MR. GOLDBERG: Your Honor, based upon Mr. Fogel's
19 testimony coming in, I want to put Mr. Levine back on the
20 stand to rebut it.

21 THE COURT: We will recess until 2:15.

22 (Luncheon recess.)
23
24
25

1 mpbr

2 AFTERNOON SESSION

3 2:15 p.m.

4
5 MR. GOLDBERG: Your Honor, I think the Court can
6 disregard our brief on the second cause of action, which has
7 now been dismissed.

8 MR. ROBERT STOLL: May I ask leave to respond?

9 THE COURT: Yes.

10 MR. GOLDBERG: Isn't it the normal procedure
11 for both sides to hand up the trial memoranda? Otherwise
12 we are going to have to go back and forth.

13 THE COURT: Well, I took my notes on this, and
14 I have the law as it was expounded in the preliminary stages
15 of the case and during the trial. I don't see any great
16 need to have an further briefing of the law. I think
17 the cases have been set forth at this point. If other
18 cases come to mind, I don't mind accepting them, but I
19 suggest they get to me as soon as possible.

20 If you send anything out ~~after~~ I have decided
21 it naturally it's not going to help me. I am going to
22 decide this in the next week. If you get anything in this
23 week I will consider it.

24 MR. ROBERT STOLL: Very good. I believe I
25 ended it at page 81, line, I will continue from that point.

mpbr

"Foqel

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"Q How is this piece ticket affixed to the fabric?

"A Well, that pin that you are holding in your hand right now is just -- well, let me show you. It is put on it like this (indicating). It is stuck right through, just like that (indicating).

"Q It is not a closed pin; it is just like a nail?

"A It locks onto the piece of goods until it is torn off, unless it is not put on properly.

"MR. KINZLER: Let the record show that the pin the witness is referring to is probably a half an inch in length, with about an eighth of an inch of a point that has no locking device or anything else.

"MR. STOLL: I think the exhibit will speak for itself.

"THE WITNESS: It is pulled through.

"Q To remove it --

"A Like this (indicating).

"MR. STOLL: Let the record show that the witness removed the pin --

"Q Let me you, when they cut this ten-yard piece which I referred to in a former question off a roll of, let's say, fifty to sixty yards of fabric, somebody goes by and

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"Fogel

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2 takes this piece ticket off and tacks it on to what is re-
3 maining?

4 "A If somebody is cutting off this part of --
5 ten yards of a roll of goods, and the ticket is on
6 the roll, they cut off ten yards, and the ticket would be
7 on there. They would remove the ticket and put it
8 back on the original piece, what is left of it, to identify
9 that piece."

10 That concludes my reading of this deposition,
11 with the observation that if your Honor happens to pick up the
12 original copy and sees it is not signed, there is a
13 stipulation that the deposition
14 a stipulation which appears in the Fogel transcript at page 3
15 and appears on the other depositions in the same case.

16 MR. GOLDBERG: Your Honor, may I respond as far
17 as the deposition is concerned?

18 First of all, your Honor, Mr. Stoll just read
19 from Page 82, stating that when ten yards are cut off,
20 the ticket is then taken from the ten yards and put onto the
21 remaining piece. I think the Court will certainly note
22 that there is no testimony anywhere that a second piece
23 ticket is prepared to put on that ten-yard piece, which,
24 of course, will circulate devoid of any notice whatsoever.

25 MR. ROBERT STOLL: I object on that, your

1 mpbr

"Fogel

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2 Honor. There's no evidence that the ten-yard piece will
3 circulate at all. The evidence is that this is done by
4 furniture manufacturers who use the fabric.

5 THE COURT: I am going to hear you in argument at
6 the end of the case.

7 MR. GOLDBERG: I refer to page 51 of Mr. Fogel's
8 deposition, where the following colloquy took place, start-
9 ing at line 23, again by Mr. Kinzler of my office asking
10 the question:

11 "Q Again, I refer to your affidavit of April 28th,
12 and I quote: 'Shortly before I left their employ, I made a
13 normal sales visit to a customer, a furniture manufacturer
14 in North Carolina, and I was there handed a small cut of
15 Jacquard fabric, which was going to be used in the manu-
16 facture of upholstered furniture.'

17 "First, I want to know what manufacturer
18 you are referring to there?

19 "Q Why not?

20 "A Because I am a salesman in that area and I am
21 afraid it might jeopardize my standing in that area."

22 On that basis, your Honor, we move to strike
23 all of Mr. Fogel's testimony regarding that alleged
24 manufacturer they got the swatch from. We have been thorough-
25 ly prevented from making any independent check of such a

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2 manufacturer, because he simply refused to tell us who it
3 was.

4 MR. ROBERT STOLL: If it please the Court, there
5 is a small statement on the record on that very page that
6 deals with this.

7 "MR. STOLL: I would like to state on the
8 record now that at the time that Mr. Glasser was testify-
9 ing in court, he too objected to giving the name of
10 a source, a customer, I believe, and I believe that
11 Mr. Goldberg backed him up on that."

12 MR. GOLDBERG: Surely, your Honor, this is not
13 responsive to my question.

14 THE COURT: The point is that at that point in
15 the deposition you should have had him produced before the
16 Court and under the pains of contempt required to answer
17 the question. Now, you didn't do that.

18 MR. GOLDBERG: Well, your Honor, our problem,
19 of course--

20 THE COURT: That's your remedy as far as that's
21 concerned. But there is this to be said about it, that
22 certainly in weighing his testimony I am going to be guided
23 by the fact that this particular answer was given.

24 MR. ROBERT STOLL: The fact is, your Honor, that
25 subsequent to this deposition we again asked Mr. Fogel to

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2 disclose his sources. He again refused to do so.

3 THE COURT: All right. Then we have an
4 anonymous customer here.

5 MR. GOLDBERG: Exactly, your Honor.

6 MR. ROBERT STOLL: And I would say this is a
7 customer of the Malden affiliate.

8 THE COURT: But it is a customer whom they are
9 unable to examine because they don't know who it was.

10 MR. GOLDBERG: Your Honor, I would like to
11 read Page 26 --

12 MR. ROBERT STOLL: They not disclosed any of
13 their sources.

14 THE COURT: You have remedies to do that. All
15 you have to do is come to Court and say "We have examined
16 these fellows and they have refused to answer," and
17 I would very quickly rule on it.

18 MR. GOLDBERG: Your Honor, we have not refused
19 to answer. Mr. Glasser testified in court that he doesn't know
20 and hasn't been able to find out.

21 THE COURT: Please finish the case.
22 I have people waiting here who have been waiting since
23 this morning, thinking that you were going to take about
24 an hour to conclude this case. In the beginning you
25 told me it would take two days. I wouldn't want to hold

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2 my breath past the time you indicate.

3 MR. GOLDBERG: Page 26 of Mr. Fogel's deposition,
4 starting at line 5 he was asked how much he made during the
5 seven months that he was working for Malden, and the response
6 was "5,000 or \$7,000" --

7 MR. ROBERT STOLL: It is totally irrelevant,
8 and I object.

9 THE COURT: The reporter can't take two voices
10 at one time.

11 MR. ROBERT STOLL: My objection is, it was
12 totally irrelevant, the amount of money that he earned.

13 MR. GOLDENBERG: It goes to credibility.

14 THE COURT: Overruled.

15 MR. GOLDBERG: "5,000 or \$7,000."

16 We then presented to Mr. Fogel computer print-
17 outs showing the actual earnings during the time he was
18 employed by Malden. These were entered as Defendant's
19 Exhibit A at Mr. Fogel's deposition, and he identified
20 them as his print-outs, and they stated in pages 35 and 36 of
21 his deposition they show he earned a total of \$3,241.46.

22 One final item on Mr. Fogel:

23 Mr. Fogel testified at his deposition, at
24 Page 46 that Belle Fabrics several years ago had asked
25 him to go to work for Belle and he refused their offer.

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2 Your Honor, I would make an application under Rule
3 32, under the exception to be able to be allowed to read
4 a very brief excerpt from Mr. Lewkowicz' deposition respond-
5 ing precisely to this claim of Mr. Fogel's that Belle
6 offered him a job.

7 MR. ROBERT STOLL: I object, your Honor.
8 Mr. Lewkowicz was on the stand. There was an ample opportunity
9 to examine him. And there was certainly no surprises in
10 our reading or using the Fogel deposition. In fact, we
11 indicated that to counsel.

12 THE COURT: I will allow it. Overruled.

13 MR. GOLDBERG: Page 40:

14 "Q Who was Myron Fogel? Have you ever heard of
15 him ?

16 "A Yes.

17 "Q Who is he?

18 "A A salesman living there.

19 "Q Does he sell anything to you?

20 "A No.

21 "Q Has he ever?

22 "A No.

23 "Q Have you had any business relationships with
24 him whatsoever?

25 "A None whatsoever.

1 mabr

2 "Q Has he ever applied to you for a job?

3 "A Yes.

4 "Q When was that?

5 "A Many years ago.

6 "Q Did you hire him?

7 "A No."

8 I have nothing further on the Fogel deposition,
9 your Honor.

10 THE COURT: We are still on rebuttal of the
11 plaintiff. Have you concluded the rebuttal?

12 MR. ROBERT STOLL: Yes, we have, your Honor.

13 THE COURT: Any further testimony on behalf of
14 the defendant?

15 MR. GOLDBERG: Your Honor, I would like
16 a very brief surrebuttal of Mr. Fogel. I would like to
17 call Mr. Sanford Levine for that purpose.

18 MR. ROBERT STOLL: I would object to that.
19 Mr. Levine testified with respect to Mr. Fogel the first
20 time he was on the stand. I see no need to put him on the
21 stand again. I announced in court yesterday that I was
22 going to read the Fogel deposition and also prior to that.

23 THE COURT: Well, I will allow an examination
24 into new matters. If there is anything that has already been
25 testified to I would sustain an objection to that.

1 mpbr Levine-direct 282

2 Strictly new matter.

3 S A N F O R D L E V I N E, recalled.

4 THE CLERK: You are still under oath,

5 Mr. Levine.

6 DIRECT EXAMINATION

7 BY MR. GOLDBERG:

8 Q Mr. Levine, to your knowledge -- I think you
9 have testified already that Myron Fogel was employed by
10 your company from approximately December '74 to the spring of
11 '75.

12 A Correct.

13 Q Under what circumstances did Mr. Fogel leave
14 Malden?

15 MR. ROBERT STOLL: Objection. This was gone in-
16 to. The term of employment and the question of whether
17 Mr. Fogel did or didn't give to the witness a specimen
18 of the fabric has been testified.

19 THE COURT: That is not the area that he is
20 talking about. It would seem to me that you represented this
21 fellow as an expert, and if he was fired because he couldn't
22 properly handle his job for some reason, he is not very much
23 of an expert.

24 MR. ROBERT STOLL: We also offered him for his
25 knowledge of personal activities with regard to this case.

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Levine-direct

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THE COURT: Well, that has been so, but the point of the matter is that it still goes to his testimony if in fact he was fired.

Overruled.

MR. GOLDBERG: And his credibility as a witness.

Q Under what circumstances did Mr. Fogel leave Malden?

A Well, to start at the beginning, in December of '74, Myron was in desperate need of a job, as he was almost starving to death, and we agreed to hire him on a six-month trial basis to see if in fact there was something we could work out with each other.

As you can see, in six months his total earnings were less than \$4,000, and obviously it hadn't worked out and we had to let him go. That's really what it is all about. He didn't perform his functions in a satisfactory manner.

Q Can you make a comparison, Mr. Levine, between the actual \$3200 that he earned during that period and what other salesmen working for Malden would have earned during that period?

A Our average salesman earns over \$40,000 a year, so that would be six times as much during the same period.

Q Mr. Levine, have you got personal knowledge of the

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Levine-direct

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use of piece tickets by manufacturers of upholstered furniture?

A Yes, I do.

Q Would you give the basis of that knowledge?

A Well, as part of my job, I visit virtually every customer in the United States, and I go to most of their factories, and in the course of that visit I see mostly what they do, how they store goods, how they cut goods, how they manufacture the furniture and so forth.

Q Do you see the bolts of fabric that you ship to them?

A Yes.

Q When you ship a bolt, is there a piece ticket on it?

A Yes.

Q Can you tell what the customer does with the bolt?

A It is entered by their receiving department. The ticket is almost always taken off of that piece. The customer's own ticket is affixed to that piece. It is then compared with the receiving record. Both documents go up to the bookkeeping department so it can be compared with an invoice, which of course comes in from Malden, so they can see if they got billed for they received.

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Levine-direct

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2 The reason they take off the tickets as a
3 rule is, those companies are computerized, and they use
4 numbers that have no relationship to the numbers from
5 Malden and Company, and they use their own color sequence as
6 to the name or number that particular mill uses.

7 One of the other reasons is that it is mostly a
8 secretive type arrangement where they don't want even their
9 own employees or outsiders to who actually is supplying
10 a different fabric to them, so that in most instances the
11 original tickets are taken off the pieces and they are entered
12 into that company.

13 MR. GOLDBERG: No further questions, your
14 Honor.

15 CROSS EXAMINATION

16 BY MR. ROBERT STOLL:

17 Q Did you testify earlier, Mr. Levine, that you
18 work with Malden, that you hold a position with Malden, is
19 that correct?

20 A Correct.

21 Q Where is your office?

22 A One Penn Plaza, New York City.

23 Q Where was Mr. Fogel employed?

24 A In High Point, North Carolina.

25 Q By what company was Mr. Fogel employed?

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Levine-cross

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2 A Weavers-Morgan Corporation.

3 Q Was he ever employed by Malden?

4 A No.

5 Q In connection with Mr. Fogel's employment

6 history I wish to read one question and one answer,

7 if I may, from Page 44, Line 5 of the Fogel deposition:

8 "Q Whom have you worked for other than Weavers-
9 Morgan?10 "A Well, I worked starting when I was 16-1/2 years
11 old for a company" --12 MR. GOLDBERG: Your Honor, I am going to
13 object. This has nothing to do with what this witness
14 said.

15 MR. ROBERT STOLL: It goes to his qualifications.

16 THE COURT: Well, you read that already. What
17 he is saying is that from this period to this period, this
18 is what he was working there and this is what he made and
19 this is what others made.20 I don't see the relevance of that at all.
21 The fact that a fellow is a poor salesman or gets poor
22 results doesn't necessarily depend upon his ability.23 MR. ROBERT STOLL: I just want to point out
24 his testimony that he worked for one company 23 years.

25 THE COURT: I heard that before, too.

1 mpbr Levine-cross

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2 Anything else of this witness?

3 BY MR. ROBERT STOLL (Continuing):

4 Q Mr. Levine, do you have any knowledge of any of
5 Belle patterns which Malden may have copied other than the
6 one before you on the podium?

7 MR. GOLDBERG: Objection, your Honor.

8 THE COURT: It is not proper cross examination.

9 MR. GOLDBERG: That is what I was about to
10 ask.

11 MR. ROBERT STOLL: This goes to credibility.

12 THE COURT: He didn't testify to anything -- it is
13 within my discretion and I sustain the objection. It is
14 a collateral matter.

15 MR. ROBERT STOLL: I would like to ask you then
16 whether you testified on your deposition in this action
17 as follows. Page 70, line 3:

18 "Q Do you have any knowledge of any patterns that
19 Malden has copied?"

20 MR. GOLDBERG: Objection. The Court has ruled
21 that it is improper cross examination. I don't see that
22 it has anything to do with the cross examination.

23 MR. ROBERT STOLL: Strictly credibility.

24 THE COURT: Well, I am not going to go into
25 collateral matters at this point.

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2 MR. ROBERT STOLL: Nothing further.

3 THE COURT: You may step down.

4 (Witness excused.)

5 THE COURT: Both sides rest?

6 MR. GOLDBERG: Yes, your Honor.

7 MR. ROBERT STOLL: Yes, sir.

8 THE COURT: All right.

9 We will first start in with the defendant's
10 motion at the end of the entire case.

11 MR. GOLDBERG: Your Honor, at this point
12 we would move to dismiss the plaintiff's first cause of
13 action on the ground that the evidence has clearly shown
14 that publications by Belle which the Court has already held
15 were inadequately noticed were very clearly authorized by
16 the plaintiff within the meaning of 17 USC Section 10. In
17 fact, there can't be any question that all of the publi-
18 cations after the license were authorized, since the plaintiff
19 actually has received royalties aggregating \$16,000 as a result
20 of those publications.

21 Moreover, there hasn't been any testimony whatsoever
22 showing that plaintiff made any effort to see that
23 Belle would place a proper copyright notice on the fabric.
24 Now, to the contrary, the evidence is they simply put down,
25 put a notice on it, on the fabric, nowhere saying "Put at

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every repeat" or what manner to use it or whatever.

On March 16th of 1976, Mr. Lewkowicz, the president of Belle, put in an affidavit in this court on the plaintiff's motion for a preliminary injunction, an affidavit prepared in the office of the attorney for the plaintiff, the same attorneys who prepared the license agreement, in which Mr. Lewkowicz stated that all of his activities, and in particular the corporate notice on the fabric he sold under the plaintiff's authority, were undertaken in rigorous accordance and compliance with the license agreement. In fact, on that same day the plaintiff's attorneys put into this court a memorandum on adequacy of copyright notice, as it was denominated, in which they said that the notice is being put on the hang tags or on the piece tickets and that this is in full compliance with the license agreement.

Now, the license agreement itself, which is in evidence as Defendant's Exhibit C, I believe -- yes -- refers to placing a copyright notice on all of the Camelot fabric or reproductions thereof sold or displayed in any form.

Then there is another full paragraph after that which has to do with not using Greeff's name or reputation and so on. This paragraph ends:

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"Belle covenants and agrees to sell the fabric licensed hereby in strict conformity with all laws, rules and regulations."

First of all, that doesn't refer to a copyright notice at all. It refers to all laws, rules and regulations. Second of all, it refers only to the sale of fabric, not the delivery of the fabric, which is the important issue here: What is the condition of the fabric when it is delivered, not when it is sold. and, third of all, even if all of that weren't so, it is very clear that this license agreement is completely insufficient to advise Belle on what they are supposed to do in order to protect the plaintiff's copyright and to protect the public from unwittingly infringing the plaintiff's copyright.

Now, the testimony of Mr. Lewkowicz, the president of Belle, and Mr. Popper, Belle's attorney, clearly showed that they came to Greeff -- the plaintiff's attorneys -- on their bended knees, begging for a license agreement. They didn't set the license agreement as a condition to the settlement of their lawsuit.

That was done with a judgment and \$10,000.

Then they said, "Please -- our company will be ruined, our reputation will be destroyed if you don't let us sell to our customers."

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2 So that under those circumstances, Greeff went
3 and allowed this license.

4 Now, that's completely different from any of the
5 cases where courts have held, well, they are just getting
6 themselves something off in settlement of a lawsuit. More-
7 over they didn't have anything to sell off at that time;
8 as Mr. Lewkowicz testified and they put in the judgment, which
9 again was prepared by plaintiff's attorneys, they had only
10 11,000 yards purchased from the beginning of their program
11 and as plaintiff's attorneys certainly learned from the
12 first of those monthly statements that Belle provided them
13 with, they had nothing in stock as of the date of the
14 license agreement. It was after that date that they received
15 and/or purchased and sold 55,000 yards of this fabric under
16 the plaintiff's authority and paid plaintiff \$16,000.

17 Now, we respectfully submit that under those
18 circumstances those publications under the plaintiff's
19 authority, under 71 USC Section 10, and I would call the
20 Court's attention to the fact that that section doesn't refer
21 to the fact that the copyright notice itself has to be
22 authorized; only the publication has to be authorized, and
23 then the plaintiff has to see to it that he imposes upon
24 his licensee a proper obligation to put on a proper notice.

25 Finally, I would like to add in that context that

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2 there has been no suggestion here that Belle is in violation
3 of the license agreement because of the notice it put on, no
4 suggestion that they are in breach of that contract.

5 To the contrary, they extended the contract for another three
6 months after that was all known to them. Certainly, had Bell
7 been in breach of contract they would have done something
8 entirely different from that.

9 So we would move, your Honor, respectfully,
10 that the plaintiff hasn't made out a prima facie case of
11 copyright infringement because they forfeited their copy-
12 right on or about October 20, 1975, and have no standing in
13 this court today.

14 MR. ROBERT STOLL: It was stipulated at the
15 outset that plaintiff's copyright is good and valid in law
16 in all respects, at least up to the October 20th transaction
17 with Belle.

18 So far as authorship, originality, all other
19 elements that go into making valid copyright at the
20 outset, that doesn't change with any of the events of
21 October 20th. Originality doesn't change, authorship
22 doesn't change, there is no contest as to that, and it is
23 stipulated.

24 There is also an agreement that the accused
25 fabric indeed embodies the copyrighted work of art.

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2 No question about that whatsoever, no denial.
3 It's been admitted by just about every witness whchas been
4 on the stand. It is also in the pleadings.

5 The only question is not what Greeff itself has
6 done with its own fabric, that is also unquestioned.
7 The only question is, what did Greeff do with respect to this
8 limited licensee, Belle? I use the term "limited"
9 advisedly. It is in Judge Lacey's judgment. It is referred
10 to in that judgment as a limited license.

11 In addition, the limited license itself refers
12 to the judgment, they are contemporaneous documents. No
13 question there.

14 It was Greeff's obligation as copyright
15 priority, to impose on any licensee, normal licensee, the
16 requirement that it put down a statutory copyright notice
17 on any goods sold or published. It is not clear whether
18 the plaintiff has that same responsibility when there
19 is settlement of litigation involved; the Colby case raises
20 a substantial question there. The point is, however,
21 that this license agreement requires and Belle, the
22 licensee, agrees to place a copyright notice -- and the
23 form of the copyright notice is also not questioned, your
24 Honor--to place a copyright notice on all of the Camelot
25 fabric or reproductions thereof sold or displayed in any

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2 form.

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3 That language is as close to the statutory lanqu-
4 age and to the Supreme Court's paraphrasing of the statutory
5 language that one can get without simply photocopying the
6 Supreme Court's opinions on this point.

7 Section 10 of the Copyright Act provides that
8 such notice should be affixed to each copy thereof. The
9 license agreement says "On all of the fabric or repro-
10 ductions thereof sold or displayed in any form." The
11 wording in the license agreement is "all"; the wording in
12 the Supreme Court decision is "each". There is no differ-
13 ence between "each" and "all." The language is in the
14 deJong case, 235 U.S. 233.

15 Justice Holmes indicates "Every reproduction
16 of a copyrighted work must bear the statutory notice."

17 The language of the license agreement is,
18 "All of the Camelot fabrics or reproductions thereof sold or
19 displayed in any form" and Judge Holmes' language, again,
20 is "every reproduction." It is very, very identical to
21 the language of the statute itself and the Supreme Court's
22 interpretation of it.

23 This is the leading case, of course, although it
24 is somewhat dated.

25 The license agreement wasn't drafted and imposed

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2 upon Belle's counsel, unfamiliar with copyright law. There
3 was no need to spell out to an attorney who has as much
4 copyright experience as any copyright practitioner I know
5 of what the statutory requirements are. It is not
6 necessary to provide a list of instructions to a copyright
7 attoreny who knows the requirements.

8 I will remind your Honor that the testimony is
9 that Mr. Lewkowicz himself wasn't directly involved in the
10 discussions which resulted in this license agreement.
11 He was self excluded from the room. He was in the
12 anteroom or the outer foyer, as the testimony went,
13 and this language was drafted with Mr. Popper, and, in ad-
14 dition, Mr. Popper's law partners, Mr. Bobus -- I don't
15 think Mr. Bobus' name came up, but he was definitely re-
16 ferred to by Mr. Popper, there is no question that competent
17 copyright counsel knew what this language meant.

18 I am at a loss to know what else a copyright
19 proprietor can do in order to fulfill its obligations
20 under Section 10 than to require performance under Section 10,
21 and that is exactly what was required in Paragraph 4 of the
22 license agreement by the almost identical language used and
23 by Mr. Popper saying he understood that meant the statutory
24 language.

25 THE COURT: Why did you send the stamp over there?

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2 MR. ROBERT STOLL: The stamp was sent over
3 there because Mr. Lewkowicz --

4 THE COURT: You see, this is like the case where
5 they said these people weren't constitutionally obliged to get
6 this kind of treatment, but once they start to give it then
7 they get a constitutional right as far as I am concerned
8 that it be done within due process.

9 Here again, if you are going to give a fellow
10 a stamp and tell him this is the way to do it, it seems to
11 me there's something lacking there, particularly the view of
12 the testimony that there is a very simple way to protect
13 your copyright, which was demonstrated here in the courtroom.

14 MR. ROBERT STOLL: Mr. Lewkowicz evidently
15 was unaware of that, because he testified he searched for
16 different ways.

17 THE COURT: Having told him that this was a
18 stamp that he could use documents you think there was
19 compliance and acquiescence in the use of that stamp.

20 MR. ROBERT STOLL: There was an objection to
21 having that demonstration placed on Mr. Lewkowicz' fabric,
22 that bolt of fabric.

23 THE COURT: Well, I ruled against you on that,
24 so as far as I am concerned, that's in the case.

25 MR. ROBERT STOLL: The point is, your Honor,

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2 and it is in the case, and Mr. Lewikwicz' affidavit that was
3 introduced by Mr. Goldberg, that he has a problem applying
4 it in the cases where the back is dark.

5 THE COURT: Well, I think that I fully under-
6 stand what both sides are driving at here.

7 MR. ROBERT STOLL: May I answer one question
8 that you raised and that is that rubber stamp. Your
9 Honor maybe noticed and there was comment that the language
10 of the rubber stamp differs slightly from the copyright notice
11 of Paragraph 4. The main difference is the addition of a
12 sentence that says "Not a Greeff product." Now, that
13 sentence is not part of the copyright notice, that sentence
14 is not contained in Paragraph 4, but we felt that it was
15 necessary.

16 MR. GOLDBERG: Your Honor, there is no testimony
17 as to this at all. We are going way beyond it.

18 MR. ROBERT STOLL: Your Honor posed a question
19 and I wanted to answer it.

20 THE COURT: Well, you can't go outside the record,
21 either. Although I may have trouble forgetting it.

22 I will add from this point on it requires me to mull over
23 the testimony and make decision because there are disputes.

24 MR. GOLDBERG: Your Honor, at Page 90 of the
25 deposition of Mr. Johan taken on June 17, 1976, the follow-

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2 ing colloquy took place: Question by me:

3 "Q To your knowledge has Greeff or anybody on
4 Greeff's behalf accused Belle of violating its license
5 agreement because of the manner in which it affixed its copy-
6 right notice to the fabric?"

7 MR. ROBERT STOLL: Your Honor, that depo-
8 sition hasn't been entered.

9 MR. GOLDBERG: The deposition is the deposition
10 of Mr. Johan.

11 THE COURT: Unless it was put in evidence
12 during the course of the trial it is not in evidence. Did
13 you read that during the course of the testimony.

14 MR. GOLDBERG: I understood this as a motion
15 to dismiss, which is part of the trial.

16 THE COURT: No, the evidence is in. You can't
17 and refer to documents that weren't put before me. That's
18 what I kept complaining to both of you about. You are
19 talking about depositions that aren't in evidence and that
20 I haven't heard.

21 MR. GOLDBERG: I am reading it now.

22 THE COURT: Well, it is long past due.

23 MR. ROBERT STOLL: I would like to refer to
24 to the 191 Fed. 2d, Page 601. That is the case of National
25 vs. Faucett.

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2 The question there is the obligation of the copyright
3 notice placed on his work, and if it not placed on the work
4 by the licensee does that result in forfeiture, and rather
5 than reading it to you I have referred you to the page, but
6 the answer is no, providing the publication wasn't with
7 the required notice, required by the licensor. It wasn't
8 a publication with the authority of the copyright proprietor.

9 THE COURT: But you have got another half of
10 that. It is active and passive it seems to me, whether
11 it is done with acquiescence.

12 No, I think I have enough here to make up
13 my mind. It is a question of going over my notes and making
14 up my mind what I believe and don't believe. I will read
15 the cases on the matter. You have one week to submit whatever
16 you want either on the law or the facts and I will make a
17 decision.

18 MR. GOLDBERG: Do we exchange things, your
19 Honor?

20 THE COURT: It seems to me that that is the
21 best thing to do; otherwise you run into extensions of
22 time.

23 MR. GOLDBERG: I am prepared to leave this
24 weekend for a Harvard law seminar, which will last two
25 weeks. I am prepared to put in my --

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2 THE COURT: Well, after this week is over, it
3 will be wasted work. I won't see it. Just satisfy him
4 that that was a piece taken from there. That's my
5 recollection. Unless he is going to dispute that.
6 I don't want to say it. Show it to him.

7 Can I ask the lawyers in that other case to come
8 upstairs. That's a conference; we could hold it up in my
9 room there. I will meet you there right away.

10 MR. GOLDBERG: Does your Honor want to keep
11 the exhibits?

12 THE COURT: I don't think we need those.
13 I have seen them before. I had trouble taking a nap now and
14 then because they were on my couch.

15 MR. GOLDBERG: We will take them, your Honor.
16 Thank you.

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**CERTIFICATE OF COPYRIGHT REGISTRATION NO. G1 93648
(PLAINTIFF'S EXHIBIT 1)**

Additional Certificate (U.S.C. 213)

Page 3

**Certificate
Registration of a Claim to Copyright
in a work of art or a model
or design for a work of art**

FORM G

REGISTRATION NO.

Gp 93648

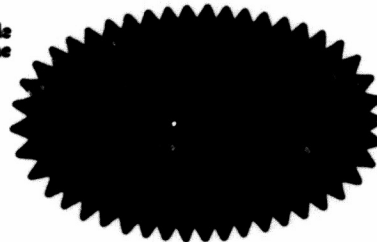
DO NOT WRITE HERE

CLASS

G

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Barbara Ringer
Register of Copyrights
United States of America

**1. Copyright Claimant(s) and Address(es):**

Name GREEFF, accepted alternative designation
for Greeff Fabrics, Inc.

Address _____

Name 150 Midland Ave., Port Chester, N. Y. 10573

Address _____

2. Title: 58710 - 13 CONTEMPLATION
(Title of the work)

3. Nature of Work: Fabric Design
(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) ☐ Weight (in pounds)
☐ Size (give dimensions) ☐ Fragility (give details)

5. Author (i.e., Artist):

Name Greeff Fabrics, Inc. Citizenship U. S. A.
(Legal name followed by pseudonym if latter appears on the copies) (Name of country)

Domiciled in U.S.A. Yes ☒ No ☐ Address 150 Midland Ave., Port Chester, N. Y. 10573

6. (a) Date of Publication:

AUG 15 1974
(Month) (Day) (Year)

(b) Place of Publication:

U. S. A.
(Name of country)

**(c) Manufacture Outside United States by Lithographic
or Photoengraving Process:**

(Name of country)

7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____
Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____
Is there any substantial **NEW MATTER** in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the **NEW MATTER** in this version: _____



Complete all applicable spaces on next page

8. Deposit account:

379a

9. Send correspondence to:

Name STOLL AND STOLL Address _____

10. Send certificate to: Empire State Building
New York, New York 10001

(Type or
print
name and
address)
Name
Address

STOLL AND STOLL		
Empire State Building		
New York, New York 10001		
(Number and street)		
(City)	(State)	(ZIP code)

Information concerning copyright in works of art

When to Use Form G. Form G is appropriate for unpublished and published works of art, and models and designs for works of art.

What Is a "Work of Art"? This category (Class G) includes works of the fine arts, and works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned. Common examples of works of art are

paintings, drawings, sculpture, ceramics, artistic jewelry, original designs applied to textiles, and the like.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

Unpublished works of art

How to Register a Claim. To obtain copyright registration, mail to the Register of Copyrights, Library of Congress, Washington, D.C. 20559, a photograph or other identifying reproduction of the work, an application on Form G, properly completed and signed, and a fee of \$6. Deposits are not returned, so do not send your only copy.

Procedure to Follow if Work Is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published edition must contain a copyright notice in the required form and position.

Published works of art

What Is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. Unrestricted public exhibition of a work of art may also constitute publication.

How to Secure Copyright in a Published Work of Art:

1. Produce copies with copyright notice.
2. Publish the work.
3. Register the copyright claim, following the instructions on page 1 of this form.

The Copyright Notice. In order to secure and maintain copyright protection in a published work, it is essential that all copies published in the United States contain the statutory copyright notice. The notice should ordinarily consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner. The year date of publication may be included in the notice, but normally it is not required.

—Alternative Form of Notice. As an alternative, the notice for works of art may consist of the symbol ©, accompanied by the initials, monogram, or mark of the copyright owner, provided the owner's name appears on some accessible part of the copies.

—Universal Copyright Convention Notice. Use of the symbol © with the name of the copyright owner and the year date of publication may result in securing copyright in countries which are parties to the Universal Copyright Convention, which protection might not be obtained by use of either of the alternative forms of notice. Example: © John Doe 1974.

Optional Deposit. For certain published works, it may be impractical to deposit actual copies because of their size, weight, fragility, or monetary value. In such cases the Register of Copyrights may permit the deposit of photographs or other reproductions instead of the actual copies, under conditions specified in the Copyright Office Regulations. If the optional form of deposit is used, it will be necessary: (1) to fill out line 4, on pages 1 and 3; and, (2) to deposit photographs or other identifying reproductions of the work. For more detailed information, write to the Copyright Office.

If you consider that first publication of your work took place by means of its unrestricted public exhibition with copyright notice, you may deposit photographs of the work.

NOTE: If copies are published without the required notice, the right to secure copyright is lost and cannot be restored.

FOR COPYRIGHT OFFICE USE ONLY		
Application received SEP. 13 1974	Two copies received 9-13-74	Photographs or reproductions received
One copy or reproduction received		
Fee received		

LETTER ON BEHALF OF GREEFF FABRICS, INC.
TO BELLE FABRICS, INC., REFUSING EXTENSION
OF LICENSE, DATED JANUARY 21, 1976
(PLAINTIFF'S EXHIBIT 12)

STOLL AND STOLL

ATTORNEYS AT LAW

EMPIRE STATE BUILDING
NEW YORK, NEW YORK 10001

PATENTS, TRADEMARKS
COPYRIGHTS

SAMUEL J. STOLL
ROBERT S. STOLL

DORIS S. HOFFMAN

212 PENNSYLVANIA 6-0290
CABLE: ATTYSTOLL NEWYORK

January 21, 1976

Mr. Jeremiah Lewkowicz
Belle Fabrics, Inc.
2 John Street
Haledon, New Jersey 07508

Dear Mr. Lewkowicz:

Your request of January 16, 1976 for an extension of the limited license agreement for the sale of Camelot fabric beyond the current expiration of May 1, 1976 has been carefully considered.

Greeff has consistently maintained a policy of stopping rather than condoning infringements. While uniformly pursuing its policy, Greeff takes pains not to cause undue hardship on infringers, particularly those who may not themselves be directly responsible for creating the infringement. Thus, in your case, Greeff has given you a limited license under its CONTEMPLATION copyright in order to help prevent an unreasonable burden. It appears, however, that the license which has been granted to May 1, 1976 should be sufficient and we regret that we must therefore decline your request for an extension.

Very truly yours,

Robert S. Stoll

RSS/gk

cc: Greeff Fabrics, Inc.
Messrs. Popper & Bobis

JUDGMENT DATED OCTOBER 20, 1975, IN
 GREEFF FABRICS, INC. v. BELLE FABRICS, INC.
 (DEFENDANT'S EXHIBIT A)

UNITED STATES DISTRICT COURT
 DISTRICT OF NEW JERSEY

-----x
 GREEFF FABRICS, INC., :

Plaintiff, :

-against- :

Docket No. 75 1774

BELLE FABRICS, INC., :

Defendant. :

ORIGINAL FILED

OCT 21 1975

ANGEL W. L. DAVIDSON, CLERK

J U D G M E N T

Upon the express representation of defendant Belle Fabrics, Inc., that, together with its subsidiaries, divisions, affiliates and all others acting in concert with it, it has purchased and offered for sale, or sold to date a total of not more than 11,000 yards of fabric embodying the fabric design accused in the complaint herein, known in one version as "CANALOT" but including all versions thereof in whatever color combination, fabric, style or pattern number or name;

NOW, therefore, in reliance upon the foregoing representation, upon the consent of the defendant and with the approval of the plaintiff, there having been no trial on the merits,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court has jurisdiction of the subject matter of the action.

2. The summons and complaint herein have been duly served upon defendant and the Court has jurisdiction of the parties to the action.

3. As between the parties to this action, the copyright in suit, Registration No. Gp 93648 is declared to be owned by the plaintiff, good and valid in law, and infringed by defendant's fabric identified as "CAMELOT" and by all other fabric which embodies the design embodied by said fabric.

4. Defendant, its subsidiaries, divisions, affiliates, all agents thereof and all acting in concert with them, are hereby enjoined and restrained from infringing said copyright in suit, Registration No. Gp 93648, except as specifically provided in a limited license between the parties entered into contemporaneously herewith.

5. Plaintiff shall have judgment against the defendant of the sum of \$10,000.00, which amount the parties have agreed upon as liquidated damages for the infringement, one half of which amount plaintiff acknowledges has been paid to it and the balance of which is payable without interest at the rate of \$1,000.00 per month due on the first of each month beginning with December, 1975 and concluding April, 1976.

6. In the event defendant violates this judgment, or it is found that defendant has misrepresented the facts upon which this judgment is based, such violation or misrepresentation shall be subject to a proceeding, for which further judgment and/or order plaintiff may move on notice or by order to show cause.

7. This judgment is not to be cited as a judicial adjudication of contested issues,

8. Neither party shall publicize this judgment without the consent of the other party.

9. This judgment is to be entered without costs or attorney's fees to either party.

Dated: Newark, New Jersey
October 20, 1975

/s/ Frederick B. Lacey
United States District Judge

The foregoing judgment is consented to:

BELLE FABRICS, INC.

By: /s/ Jeremiah L. Lewkowicz
Jeremiah L. Lewkowicz,
President

The foregoing judgment is approved:

~~GRUFF~~ FABRICS, INC.

By: /s/ Richard C. Johann
Richard C. Johann,
President

The foregoing judgment is approved as to form:

BUSCH and BUSCH
Attorneys for Plaintiffs
99 Bayard Street
New Brunswick, New Jersey

By: /s/ Michael R. Busch
A Member of the Firm

STOLL and STOLL
of Counsel to Plaintiff
Empire State Building
New York, New York

By: [Signature]
A Member of the Firm

POPPER & BOBIS
Attorneys for Defendant
17 Academy Street
Newark, New Jersey 07102

By: [Signature]
A Member of the Firm

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On this 20th day of October, 1975, before me personally appeared Jerimiah L. Lewkowicz, who acknowledged himself to be President of Belle Fabrics, Inc., a New Jersey corporation, defendant herein, and that he, as such President, being duly authorized so to do, executed the foregoing consent for the purposes therein set forth, as the free act and deed of said corporation.

[Signature]
Notary Public

SAMUEL J. STOLL
NOTARY PUBLIC, State of New York
No. 31-5815725, New York County
Term Expires March 30, 1977

AFFIDAVIT OF RICHARD C. JOHANN, PRESIDENT
OF GREEFF FABRICS, INC., DATED MAY, 1976
(DEFENDANT'S EXHIBIT B)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

GREEFF FABRICS, INC.,	:	
	:	
Plaintiff,	:	
	:	76 Civ. 1138 (JMC)
-against-	:	
	:	
MALDEN MILLS INDUSTRIES, INC.,	:	
	:	
Defendant.	:	

-----x

AFFIDAVIT OF RICHARD C. JOHANN

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

Richard C. Johann, being duly sworn, deposes and says that I am president of Greeff Fabrics, Inc., and I respectfully submit this affidavit in support of Greeff's motion for a rehearing or for renewal of its motion for a preliminary injunction.

1. Greeff has never authorized the use of a hang-tag or piece ticket copyright notice by Belle Fabrics, Inc. or a single notice per bolt. Greeff's authorization was for a correct legal notice such as Greeff itself uses, namely, a copyright notice applied to the selvedge at each repeat of the pattern.

2. Greeff would not have given Belle any period of time within which to phase-out its infringing fabric or to

fill re-orders were it not for the plea of Belle's president that abrupt cessation of sales of its infringing fabric would have devastating consequences to Belle.

3. Greeff would never have licensed Belle for any reason if this meant jeopardizing Greeff's copyright.

Richard C. Johann

Sworn to before me this
day of May, 1976

Notary Public

AGREEMENT BETWEEN GREEFF FABRICS, INC.
AND BELLE FABRICS, INC.
DATED, OCTOBER 20, 1975
(DEFENDANT'S EXHIBIT C)

AGREEMENT, dated as of October 20, 1975 between Greeff Fabrics, Inc., 150 Midland Avenue, Port Chester, New York ("Greeff") and Belle Fabrics, Inc., 2 John Street, Haledon, Patterson, New Jersey ("Belle").

WHEREAS, Greeff heretofore, on October 14, 1975, commenced an action against Belle in the United States District Court for the District of New Jersey, Docket No. 75-1774; and

WHEREAS, the parties hereto have determined to settle and compromise their differences, of the allegations in that action raised;

NOW THEREFORE, the parties hereto, in consideration for the benefits to be mutually derived herefrom, hereby agree as follows:

1. a. Greeff and Belle hereby agree to enter into a Consent Judgment in the aforesaid action in the form appended hereto as Exhibit A, and Greeff shall submit the same to the Court for signature and entry, which Judgment shall be in final disposition of the aforesaid action and all matters raised therein subject to full compliance with its terms and the terms hereof.

b. This Judgment when entered shall be deemed to release and discharge any and all purchasers of goods which embodies the licensed Greeff Design manufactured by or for Belle

EXHIBIT A

and sold by Belle to said purchasers, prior to the making of this License and as to which Greeff has not heretofore brought action.

2. Belle will conduct the orderly sale of its infringing fabric, designated as "CAMELOT", by continuing in its usual business concerning this line through May 1, 1976 only and by phasing-out that fabric. Said orderly phasing-out will be completed on or before May 1, 1976. Promotion and advertising shall be limited in accordance with the intent of this license. There shall be no promotion or advertising after April 1, 1976.

3. Greeff hereby grants to Belle a limited, non-assignable license to continue to sell Belle's "CAMELOT" fabric, said license to terminate May 1, 1976, upon the terms and conditions herein set forth.

4. Belle agrees to place the following copyright notice on all of the "CAMELOT" fabric or reproductions thereof sold or displayed in any form:

"Fabric design licensed and copyright ©
by Greeff Fabrics, Inc."

Belle covenants and agrees not to use Greeff's name, reputation or copyright notice as the basis of any advertising or promotion, nor to imply any relationship with Greeff as to business or source of supply. Belle covenants and agrees to indemnify and to hold Greeff harmless from any such implication or the consequences thereof. Belle covenants and agrees

to sell the fabric licensed hereby in strict conformity with all laws, rules and regulations.

5. Belle will submit to Greeff or its attorneys a sworn, notarized statement every thirty days following November 1, 1975 of the total yardage of "CAMELOT" fabric received, sold, shipped and left in stock for the calendar month next preceding said statement, together with a remittance in the amount of thirty cents (30¢) per linear yard for all such material sold or otherwise disposed of during said month, except that the first statement shall account for the period October 20, 1975 - October 31, 1975.

6. This Agreement is entered into solely for the purpose of settling the matters set forth herein and Greeff and Belle each warrant and represent that neither this Agreement nor any reference to its contents shall be used in any manner for publicity or advertising or in any way disseminated in the trade or made public unless in response to a subpoena, or a demand or requirement made by any court or government agency.

7. This Agreement, made and executed in New York, shall benefit and bind the parties hereto.

GREEFF FABRICS, INC.

By: 

BELLE FABRICS, INC.

By:  220

AMENDED AGREEMENT DATED APRIL 23, 1976
BETWEEN
GREEFF FABRICS, INC. and BELLE FABRICS, INC.
(DEFENDANT'S EXHIBIT D)

AMENDMENT TO Agreement dated as of October 20, 1975
("Agreement") between Greeff Fabrics, Inc., 150 Midland Avenue,
Port Chester, New York ("Greeff") and Belle Fabrics, Inc.,
2 John Street, Haledon, New Jersey ("Belle").

WHEREAS, pursuant to paragraph 3 of said Agreement,
Greeff has granted to Belle a limited, non-assignable license
to continue to sell Belle's "CAMELOT" fabric, which license
will terminate on May 1, 1976, and

WHEREAS, Belle has advised Greeff that Belle has been
unable to fill current orders for such fabric and that term-
ination of said limited license on May 1, 1976 will cause
undue hardship to Belle,

NOW THEREFORE, in consideration of the benefits to be
mutually derived herefrom, the parties agree as follows:

1. Belle represents that it has scrupulously applied
and will continue to scrupulously apply the following copy-
right notice to all CAMELOT fabric or reproductions thereof
sold or displayed in any form:

Fabric Design Copyright
© by Greeff Fabrics, Inc.
Not a Greeff product.

8/5
This notice shall be applied to each repeat of the pattern.

2. Greeff, in reliance upon the foregoing represent-
ation, hereby agrees to extend the term of said limited license
for a period of three months, and said limited license will
terminate August 1, 1976, upon the terms and conditions hereof
and of said Agreement. There shall be no promotion or adver-
tising after April 1, 1976, and sales and shipments will be
limited to presently existing orders.

3. Greeff will without obligation consider further extensions of the term of the limited license on a month-to-month basis, for not more than two additional months, upon a showing of need by Belle.

4. The parties covenant and agree that all other provisions of said Agreement not inconsistent herewith are continued in full force and effect.

In Witness Whereof, the parties have executed this Amendment as of the ^{April} 23rd day of March, 1976.

Greeff Fabrics, Inc.

By *Sam J. Hall*
Attorney

Belle Fabrics, Inc.

By *J. R. ...*

GREEFF FABRICS, INC., :
 Plaintiff, :
 -against- : 76 Civ. 1188 (JNC)
MALDEN MILLS INDUSTRIES, INC., :
 Defendant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremiah Lewkowicz, being duly sworn, deposes and says that I am president of Belle Fabrics, Inc. of Haledon, New Jersey.

1. On or about October 20, 1975, Belle Fabrics, Inc. settled an action entitled Greeff Fabrics, Inc. -v- Belle Fabrics, Inc., Docket No. 75-1774, District of New Jersey, by executing a consent judgment recognizing validity of Greeff's CONTEMPLATION Copyright Registration No. 93648, infringement thereof by Belle's CAMELOT fabric and enjoining and restraining Belle from further infringement of that copyright except as provided in a limited license.

2. The limited license, dated October 20, 1975, provides for an orderly close-out of Belle's CAMELOT line. This limited license was granted by Greeff at my plea to prevent

the extreme hardship to Belle which would have occurred had it been necessary to drop the line suddenly, thereby leaving customers' orders unfilled. The limited license, a copy of which is annexed hereto as Appendix 1 and which includes a copy of the consent judgment as its Exhibit A, was for a six-month close-out period only. I have recently been asking Greeff for an extension of the term of the limited license, again to prevent undue hardship to Belle from failure to fill customers' needs.

3. I have at all times scrupulously applied the Greeff copyright notice to all CAMELOT fabric sold or displayed in any form in strict accordance with the requirements of the limited license. In fact, in order to avoid possible misunderstandings or errors, I asked Greeff's attorney to provide the proper copyright notice to me and this was done in the form of a rubber stamp.

4. The rubber stamp copyright notice is applied to a Belle identifying tag which is affixed to each and every piece of CAMELOT fabric sold or displayed under the limited license. CAMELOT fabric is sold only in rolls; this is known in the industry as a "piece" but this is not to be confused with selling fabric in small cuts which Belle does not do. At no time has Belle sold such fabric in less than full rolls. I have made certain that all CAMELOT fabric without exception bears the copyright notice. I have done this since Belle's settlement with Greeff, I continue to do so and I would not jeopardize Belle's limited license by doing otherwise. Actual specimens of the identifying tags used are annexed hereto, the yellow tag being attached by the barb to a roll and the white card being stapled to samples.

5. CAMELOT fabric is a heavy woven velvet. Contrary to the case of that printed fabric, it is extremely difficult to apply a written legend to wovens, although it can be done with great effort when the jacquard machines are initially being set up to weave a new pattern. With CAMELOT, however, the requirement for applying Greeff's copyright notice came after the machines had been producing the fabric. To my best knowledge, it is a virtual impossibility to apply a woven or printed copyright notice to CAMELOT goods since the jacquard machines would have to be modified substantially for this purpose. The cost of such changes may well be greater than the cost of preparing the machines for the original production of CAMELOT.

Jeremiah Lewkowicz

Sworn to before me this
17 day of March, 1976

Notary Public

AFFIDAVIT OF JEREMIAH LEWKOWICZ
 DATED APRIL 23, 1976
 (DEFENDANT'S EXHIBIT J)

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----x

GREEFF FABRICS, INC.,	:	
	:	
Plaintiff,	:	
	:	76 Civ. 1188 (JNC)
-against-	:	
	:	
MALDEN MILLS INDUSTRIES, INC.,	:	
	:	
Defendant.	:	

-----x

AFFIDAVIT OF JEREMIAH LEWKOWICZ

STATE OF NEW YORK) ss.:
 COUNTY OF NEW YORK)

Jeremiah Lewkowicz, being duly sworn, deposes and says:

I am the president of Belle Fabrics, Inc. of Haledon, New Jersey. I have just been informed by the attorneys for Greeff Fabrics, that applying a copyright notice to the CAMELOT fabric which we are selling pursuant to license from Greeff has been held to be "insufficient to protect Greeff's copyright" (Memorandum Decision, page 8).

This is highly regrettable since we have very scrupulously tried to comply with all requirements of the copyright law. It is all the more regrettable since this license was granted to us only upon our urgent plea for Greeff's sympathetic consideration of our predicament. We had orders and re-orders for this

fabric and we had to protect our customers. It is ironic that Greeff's willingness to help us should result in the loss of the copyright.

The purpose of this affidavit is to set the record straight concerning our operations under the license from Greeff.

1. I have been informed by the Greeff attorneys that the Court has made the following findings (Memorandum Decision, page 11 and note 18):

"Furthermore, petitioner seems to have been aware of Belle's method of affixing the copyright notice to the infringing fabric, since its own attorney supplied the rubber stamp to be used for this purpose.¹⁸ These facts strongly indicate that Greeff did authorize Belle's inadequately noticed publications."

"18. In fact, Greeff has made no attempt to contradict this assertion."

It is true that the copyright notice and the rubber stamp were supplied to us by Greeff's attorneys, but it is not true that they (or Greeff itself) authorized our method of affixing the copyright notice to the goods. Indeed, it was not until we were informed of Malden's defense in this case that we described to Greeff's attorneys how we were affixing the copyright notice (by piece ticket attached to the goods) and why

we were unable to apply the rubber stamp to the selvedge of our goods.

2. The decision to apply the copyright notice to the tickets, and only one to a bolt, was entirely ours, and it was definitely not directed or authorized or approved in any way by Greeff or Greeff's attorneys.

We applied the copyright notice to these tickets because we thought this was entirely right and proper, and we knew of no other way of applying the copyright notice to the goods. We applied only one copyright notice to each bolt because we thought this was fully adequate under the particular circumstances of our business.

3. We still think we were right in applying the copyright notice as we did, and I shall here explain why, but we have nevertheless agreed to a different procedure pursuant to instructions from Greeff's attorneys. We have been informed that extension of our limited license, which we urgently need, is contingent upon our adoption of the new procedure. Aside from that consideration, it is our desire and intention to cooperate with Greeff in protecting its copyright, and we shall comply with the instructions of Greeff's attorneys even though this will be difficult and costly. As I shall shortly explain,

Greeff's attorneys have supplied us with another rubber stamp embodying the copyright notice and we shall apply it to the back of our fabric at every "repeat" of the pattern.

4. The fabric which we sell under Greeff's license is made by the Jacquard weaving process. I know of no way of using a Jacquard loom to weave a copyright notice into the pattern without distorting and defacing the pattern, wasting yarn, and causing problems for the manufacturers who uses the fabric. I know of no Jacquard fabric - no matter by whom made - which has a copyright notice woven into it. We ourselves have certain Jacquard designs which we wish to protect by copyright, but we have been unable - nor have our various Jacquard mills been able - to devise a practical method of applying a copyright notice.

In a printing process (Greeff's copyrighted goods are printed and so are Malden's goods in this case) it is a simple matter to apply a copyright notice to the printing roller (or to the silk or rotary screen) and to print same on the selvedge of the goods. This does not in the slightest affect or intrude upon the printed pattern.

5. But the Jacquard process cannot be used to accomplish this result. In the Jacquard process, the repeats run from selvedge to selvedge, transversely across the fabric, and not longitudinally along the length of the fabric. The weaving

operation is continuous from repeat to repeat across the fabric, as the fabric moves longitudinally, and although the copyright notice would be formed along one side of the edge, this is considered, in terms of the operation of the Jacquard loom, as being between repeats. Weaving a copyright notice into Jacquard goods, would require goods of extra width (beyond the capacity of many Jacquard looms), it would require that the copyright notice be woven into the pattern, and it would distort the pattern. Even if this could be done, customers would rebel since it would increase the price of the goods, produce a pattern which would be incompatible with their specifications, and require, the extra operations of removing the copyright notice from the goods and re-fitting their own cutting patterns to the revised pattern of the goods. None of this would be tolerated by our customers.

6. With particular reference to the licensed CAMELOT pattern, it is impossible to apply the copyright notice with the existing punched Jacquard cards. The fabric is produced in Belgium and the punched cards for this pattern were made before we obtained our license from Greeff. Indeed, these are the punched cards which were used to produce the infringing fabric for which we were sued by Greeff. A new set of Jacquard cards would have to be designed and punched in order to incorporate a copyright notice into the pattern, and this would involve a prohibitive cost, and result in the defacement of the pattern above described.

I attach to this affidavit as Exhibit A, an excerpt (pages 117-121) from the textbook entitled "Textile Fabrics and Their Selection" by Isabel B. Wingate, Sixth Edition, Prentice-Hall, so that the Court may appreciate the complexity of the Jacquard process and why we cannot use our punched cards to give copyright notice.

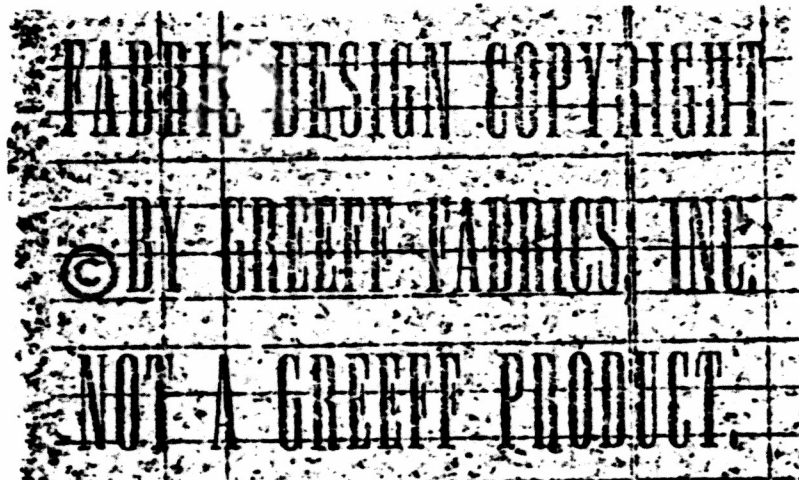
7. Nor can a copyright notice be stamped upon the selvedge of Jacquard goods (as Greeff's attorneys thought possible). The reasons are: (a) the selvedge varies in width and is frequently too narrow for this purpose, and (b) the selvedge is multi-colored with all of the yarns used in weaving the pattern and a copyright notice stamped on the selvedge would not be legible. Each Jacquard pattern is normally woven in various color combinations, and, especially where the colors are dark, no stamped copyright notice on the selvedge would be legible. I do not know of any Jacquard goods - made by any mill - which have a copyright notice applied to the selvedge.

8. Nor do I know of any Jacquard goods which have a copyright notice printed or stamped on the back of the goods. The woven pattern comes through the back and the back surface is knotty or knobby and it also reflects the various colors of the yarns used in the weave. I do not know of any Jacquard goods which have a copyright notice stamped or printed on the back.

471a

In the one instance known to me where this has been attempted (in a local Jacquard mill), I am informed that they were unable to control the ink, and it transferred to the face of the fabric when it was rolled into a bolt, resulting in defective goods.

8. It is this method, however, that we have agreed to use in applying Greeff's copyright notice, to our licensed goods. Greeff's attorneys have supplied us with a large rubber stamp, thus,



and we have undertaken to devise a method of applying this stamp to the back of the goods, at each longitudinal "repeat" of the pattern, without damaging the goods.

9. Let me now explain why we used the piece ticket method of applying the copyright to the licensed goods, and

why we applied only one such notice to each bolt.

These tickets are universally used in the industry. They are securely attached to the bolts either by metal staples or by a strong string and a metal barb-type fastener (which is readily inserted into the fabric or through a punched hole in the tubular core). A specimen ticket is hereto annexed as Exhibit B. We used a folded card or header, stapled to the fabric, to apply the copyright notice to samples. A specimen card is annexed as Exhibit C.

Although these tickets are sometimes called "tags", their correct name, as used in the industry, is "ticket" or "piece ticket". A ticket is not a hang tag in the sense hang tags are used in other industries. A retail dealer and his customer could not care less whether a hang tag is hung on a doll or removed from the doll or whatever. In the textile industry, however, a ticket performs a vital function and it is a permanent part of a bolt of fabric as long as fabric remains in the bolt. As annexed Exhibit B shows, the ticket identifies the fabric to which it is attached by the name of the manufacturer, the customers' order number, the piece number, the number or name of the pattern, the color designation, the yardage and other special information (under "Remarks") such as the finish. These product specifications are essential information not only to those who make and process the fabric, but also to those who use it.

10. The ticket is repeatedly referred to as long as there is fabric on the core. It is used to check the fabric against the purchase order or invoice, it is used for returns and re-orders, it is used to identify the fabric when it passes from manufacturer to processor or finisher to customer, and it is constantly referred to in the customer's warehouse or stock-room and cutting room.

If the ticket is detached for whatever reason, it is immediately re-attached, so that the fabric will retain its identification. It is sometimes attached to the core so that cuts of fabric can be severed from the bolt without removing the ticket. The ticket is never discarded until the bolt is fully exhausted, and, even then it may be retained for re-order purposes.

To characterize a ticket in the textile industry as a hang tag in the sense used in other industries is to misconstrue the function and method of use of the ticket. It is permanently attached to the bolt and as long as the bolt exists, the ticket is as important to the customer as it is to the manufacturer, the processor and the finisher.

11. The most appropriate place to apply a copyright notice (when it cannot be printed on the selvedge as in printed goods) is the ticket. Here is where a notice is most

likely to reach the attention of all concerned, including those who are interested in ascertaining whether the fabric is protected by copyright. I wish to assure the Court that the copyright notice we applied to our licensed fabric was actual notice to the industry, and it remained actual notice as long as there was fabric in the bolt.

12. Only one ticket was attached to each bolt of the licensed fabric because this is the universal practice in the industry and it would add nothing but confusion and trouble to attach more than one ticket to a given bolt.

The licensed fabric is sold only by the bolt and only to manufacturers of upholstered furniture who use the goods as upholstery fabric. The fabric is not sold by the yard as piece goods in retail stores. A single ticket on a bolt, going to a single customer, provides as much copyright notice (and as much specification information) as would 70 or more tickets on the same bolt (depending on its length), one for repeat. A 50 yard bolt of our CAMELOT fabric would contain approximately 70 "repeats" of the pattern.

13. 70 tickets per bolt would present problems for us and for our customers. To attach 70 tickets to each bolt, we would have to unroll same, attach the tickets individually to each repeat, and then re-roll the fabric. This would be costly and

time-consuming, and the 70 tickets, all attached to one end of the bolt, would make for problems in the use of fabric handling equipment. The presence of 70 tickets on the fabric would similarly give the customer unnecessary problems. For example, in the normal use of this fabric, it would be spread upon a long cutting table (perhaps 50 feet long), layer upon layer (to a height of, say, two or three dozen layers) and the multiple layers would then be cut by a power-drive cutter in accordance with the customer's pattern. The fabric could not be laid with the attached tickets and they would laboriously have to be removed in order to do the work. To insist on 70 tickets per bolt of goods would, in my opinion, effectively remove the goods from the market. No fabric manufacturer imposes this burden on his customers and no customer would permit him to do so. To insist on so many tickets per bolt of goods would in my opinion effectively remove such goods from the market.

14. Requiring 70 tickets per bolt would give rise to another, even more difficult, problem. Approximately half of the CAMELOT fabric is processed by the "Scotch Guard" process of rendering the fabric soild and water resistant. This process, in our case, is performed by the Synthetic Finishing Corporation in Philadelphia. We ship our goods to them, they process the goods, and then ship the finished goods directly to our customers.

The "Scotch Guard" process is a wet process, neces-

sitating removal of the ticket before the operation is begun and replacement of the ticket at the conclusion of the operation. If we attached 70 tickets to the bolt, one at each "repeat", and required the processing plant to remove them in order to process the goods, and then to re-affix them to the goods, one at each repeat, they would refuse to accept our business.

15. There is another reason why I believe a single copyright notice per bolt should be acceptable to the Court. Jacquard fabric does not have a series of "repeats" running the length of the fabric in the same sense as does printed fabric. Although a printing roller operates continuously, each revolution produces a separate printing upon a continuous fabric and each printing is a repeat. In a Jacquard weaving operation, there is no fabric separate and apart from the pattern, both are woven at the same time with the same yarn. The process is continuous, regardless of the number of times the same pattern is woven. Theoretically, the chains of punched cards which control the Jacquard loom could be hundreds or thousands of feet long, and they could weave the same pattern time and time again from the same run of the cards. But there would still be a single, continuous design, however repetitive in appearance, resulting from a single, continuous operation of the loom. And this is how the Jacquard process operates, no matter how long the chains of punched cards may be.

I do not know how Jacquard fabric is viewed legally under the Copyright Law, but as a technical matter it is a single continuous design with a repititious theme.

16. In every possible way we have sought to honor our commitments to Greeff and to meet the requirements of the Copyright Law. We know of no better way of giving copyright notice than the way we have adopted, and I again assure the Court that this method has in fact given actual notice of the copyright to the industry and all others concerned.

17. Nevertheless, as above stated, Greeff's attorneys have requested, and we have agreed, that the copyright notice be stamped upon the back of the licensed fabric, at each "repeat" of the pattern. We have not yet worked out this procedure and do not know how successful it will be, but it is a condition of our obtaining an extension of our license unless the Court should reconsider its ruling that a single copyright notice on a single ticket attached to a bolt of Jacquard goods sold only to a manufacturing customer, is insufficient under the Copyright Law.

18. I respectfully urge the Court to reconsider this ruling. Otherwise, we shall be unable to obtain an extension of our license if we should be unable to apply the copyright

vice to the back of the goods pursuant to our agreement with the attorneys for Greeff.

19. It would be most unfortunate and the consequences to us and our customers would be very serious if the license is not extended. It should be understood that as a result of the suit which Greeff brought against us we stopped offering our CAMELOT pattern to our customers and we removed it from our active product line. Even after we obtained the license from Greeff we refrained (except in a few isolated instances) from offering this pattern since we were faced with a cut-off date (May 1, 1976) beyond which we couldn't sell. We expected that orders would gradually peter out and that the pattern would eventually fade out of our business. Instead, the pattern became even more popular and re-orders kept coming in.

20. We thereupon approached Greeff and asked for a 6-months extension of our license. At first they refused the request, see the annexed copy of their attorneys' letter of January 21, 1976, Exhibit D. However, we persisted in our efforts and explained our urgent need of additional time to protect customers. They finally relented and tentatively agreed to extend our license for an additional 3-months period - from May 1 to August 1, 1976. See the annexed copy of an Amendment to Agreement, Exhibit E,* which we have signed and forwarded to Greeff, but which has not as yet been returned to us by Greeff.

* [Exhibit E is now signed.
Same / Greeff]

Without this extension, our license will expire on May 1, 1970.

21. We ordered an additional 3-month's supply of the licensed fabric from our Belgian supplier. This was done not for the purpose of offering the pattern to new customers or soliciting new business from old customers, but solely to fill re-orders from customers who had previously bought this fabric. We ordered approximately 30,000 yards from our Belgian supplier, to be supplied at the rate of about 10,000 yards per month. - Our supplier has procured and processed (dyed) enough yarn to fill our order and I assume that work has begun filling the order. I estimate the supplier's investment at approximately \$90,000. Our obligation in this transaction is to take title to the goods at approximately \$4.75 per yard F.O.B. Belgium, for a total of about \$135,000. The price is a variable, determined at each shipment.

22. We have orders from our customers for much of this goods, and we expect additional orders in the ensuing months, and this will consume the entire production for which we have committed ourselves. I repeat that these are re-orders from existing customers, not new orders solicited by us either from new customers, or from old customers. It would be a great hardship on the customers who have given us these reorders and ourselves, if we should be precluded by the multiple copyright notice requirement from filling these orders.

23. I respectfully and strongly urge the Court, under the circumstances of this case not to require more than one copyright notice per bolt and not to require a copyright notice in any form that cannot technically or commercially be used. We want to comply with the law, we want to give adequate copyright notice to all, we want to protect Greeff's copyright against innocent infringers, and we also want to serve our customers and meet our obligations to our supplier. We are entirely willing to comply with any requirement of the Court which will be technically feasible and commercially acceptable.

But bearing in mind that we are dealing here with Jacquard fabric, it is not feasible to affix a copyright notice to each repeat of the pattern, and, also bearing in mind that this fabric is sold only by the bolt and only to the ultimate consumer (manufacturers of upholstered furniture), to require a separate copyright notice for each repeat would add nothing in the way of notice, and would only make it impossible to process and sell the fabric. I sincerely hope the Court will not insist upon these requirements.

Time is of the essence in this case since our original license is due to expire on May 1, 1976 and both we and our customers will be in a most difficult bind if our license is not extended.

24. I also wish to correct the record concerning our marketing of the licensed CAMELOT fabric. I am informed by the attorneys for Greeff that the following statements appear in "Defendant's Memorandum of Law in Opposition to Motion for Preliminary Injunction", pages 4, 5:

Page 4: (a) Defendant was given a piece of the Belle fabric, approximately one yard long and selva to selva in width, and asked to copy it. There was no copy-right notice on the selvages, or on the reverse side of the fabric, or anywhere else on the fabric.

(b) Before copying this one-yard piece of fabric which appeared to be in the public domain, defendant instructed its salesmen to search the market and see if any one was reserving any rights in this fabric. Defendant's salesmen brought back to defendant a piece of the same fabric, approximately ten yards long and selva to selva in width. Upon inspection, defendant saw that there was no copyright notice on the selvages, or on the reverse side of the fabric, or anywhere else on this ten-yard piece of fabric.

Page 5: (d) After receiving the papers in this case, defendant again sent its salesmen into the market to see if this fabric was still being sold without any reservation of rights. Defendant's salesmen were now able to obtain an additional five yards of this fabric, selva to selva in width. There was no copyright notice on the selvages or on the reverse side of the fabric. This time, however, there was a piece ticket stapled to the fabric indicating that it was made in Belgium by Belle Fabrics, Inc., giving the piece number, pattern name, color, and total yards of piece. Printed at the bottom of this piece ticket was a warning that no claims would be allowed after cloth had been cut. Nowhere on the face of this piece ticket was there any copyright notice or other notice that Belle or any other party was claiming copyright in this fabric. Defendant thereafter unstapled the piece ticket and found on the back of it a legend indicating that Greeff claimed copyright in this design. This legend could not be seen until the piece ticket was unstapled and removed from the fabric and turned upside down. (My emphasis)

25. These statements give a wrong impression to the Court. There is no "market" where our fabric can be purchased. We are the only ones who sell the fabric and we sell only to manufacturers of upholstered furniture who do not re-sell the fabric, as fabric, to others.

26. There is no indication in the above quoted statements when and where Malden obtained the first two cuts (the one and ten yard cuts). I am informed by Greeff's attorneys that although these questions arose at the hearing in Court (Transcript of Hearing, pages 11, 14, 28) Malden provided no answers. If we made and sold these cuts prior to October 20, 1975 they are infringing goods and were not sold by authorization of Greeff, and would not have a copyright notice. If we sold the cuts after October 20, 1975, the bolt or bolts from which they were taken definitely did have a copyright notice, and Malden's supplier (our customer) definitely was aware of the copyright. As the accompanying affidavit of Jeffrey Haber states, at least one of the first two cuts was undoubtedly obtained by Malden and its supplier before October 20, 1975, and that would mean it was not licensed goods.

27. After receiving the papers in this case, Malden "again sent its salesmen into the market to see if this fabric was still being sold without any reservation of rights." This time the salesmen obtained an additional five yards of the fabric. There was "a piece ticket stapled to the fabric" and on the back of the ticket there was our copyright notice. It is stated that "This legend could not be seen until the piece ticket

was unstapled and removed from the fabric and turned upside down."

28. There is no significance to the fact that the copyright notice was applied to the back of the ticket. We have applied the notice to the face of the ticket, to the back of the ticket, and to both the face and back. It was never our intention to conceal the copyright notice. We have never deliberately applied the copyright notice to the back of the ticket and then stapled it to the goods face up so that the copyright notice would not be visible.

Who stapled this particular ticket to the fabric, I do not know. However, if this fabric was treated by the "Scotch Guard" process, the ticket was stapled to the fabric by the people who processed it at the plant of the Synthetic Finishing Corporation in Philadelphia. As I have above stated, the ticket is removed from the goods before the process is performed, and it is then re-attached to the goods at the conclusion of this process.

Our own practise varied. We have stapled the ticket to the goods in perhaps half of our production and we have attached the ticket to the goods in the remaining half of our production by a string and metal barb fastener.

29. What is highly significant about the ticket on the third cut (the five-yard cut) of our fabric which Malden obtained

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from an unnamed source, is that it identifies the source, namely, William Allen of High Point, North Carolina.

30. William Allen is a customer of ours, engaged in the business of manufacturing upholstered furniture. We have been selling our licensed fabric to this customer for use in his manufacturing business. I am quite certain he is not engaged in the business of reselling the fabric as piece goods. I have no doubt that William Allen is aware the fabric is copyrighted, and, if Malden were really interested in ascertaining whether "this fabric was still being sold without any reservation of rights", Malden could have asked William Allen.

31. I wish to emphasize to the Court that all licensed fabric sold by us following the date of the Greeff licensing agreement carried the copyright notice affixed in the manner above described. If the manner in which we affixed the copyright notice was not proper, this was purely an error or mistake on our part. It was our intention to provide a good and valid copyright notice and whatever we did was done in good faith. Actually, the problem relates only to a few hundred bolts of cloth. Our Jacquard cloth is not a mass-produced, widely sold material. It is a limited production fabric, commanding a high price, and reaching only a small, discriminating clientele. I refer to the ultimate consumer, the purchaser of the

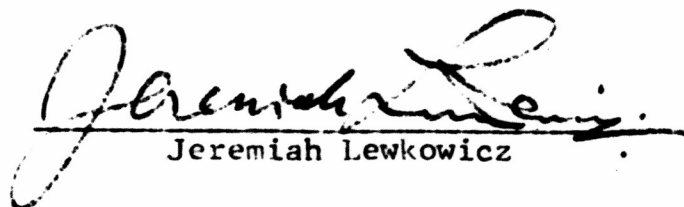
upholstered furniture.

32. No innocent purchaser has been misled by our copyright marking system. Malden is not an innocent purchaser and it has not been misled. Malden is a competitor of ours and Malden knew exactly what it was doing when it undertook to copy our fabric. Malden deliberately copied the fabric, knowing it was ours, and Malden then put on the market a low-priced printed copy - not a Jacquard fabric, but a printed fabric - in competition with us.

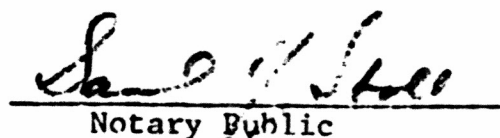
33. So that the Court will not confuse our conduct vis-a-vis Greeff, with Malden's conduct vis-a-vis us, let me assure the Court that when we put our infringing copy of Greeff's pattern on the market we did so entirely innocently. We were not the ones who copied Greeff's pattern although we did sell the infringing goods. When the charge of infringement was made against us we consulted our attorneys, concluded we were in the wrong, and paid for our mistake. It cost us a lot of money to protect our customers, but we did so because we conduct our business in an honorable fashion.

34. I respectfully urge the Court to reconsider its decision in this case, so that Greeff's copyright will be sustained, and Malden's infringing competition will be forth-

with enjoined. Time is very important, since one infringement begets others. I have just brought to Greeff's attention another infringement (there are others) of its copyright pattern, in a printed fabric, which, like Malden's competes directly with our fabric. These infringements are harmful to Greeff, but they are also harmful to us. We have to compete against low priced printed goods (selling for \$4.50 to \$5 per yard) with high priced Jacquard fabric (selling for \$7.75 per yard) and we have to pay royalties for our license to do so. To date our royalty payments have totalled about \$25,000. I urge the Court to give sympathetic consideration to our predicament.


Jeremiah Lewkowicz

Sworn to before me this
23rd day of April, 1976


Notary Public

SAMUEL J. STONE
NOTARY PUBLIC, State of New York
No. 31-32 1225, New York County
Term Expires March 30, 1977

Isabel B. Wingate

*Professor Emeritus of Retail Management
Institute of Retail Management
New York University*

TEXTILE FABRICS AND THEIR SELECTION

sixth edition

PRENTICE-HALL, INC., Englewood Cliffs, N.J.

EXHIBIT A

JACQUARD WEAVE

Up to this point no explanation has been made of how beautiful floral designs or elaborate figures are woven into a cloth. How are shamrocks woven into linen tablecloths? What makes the basket of flowers in the silk upholstery damask? How is the wide border with the sailboat made in the turkish towel? There are two methods of making all-over figured weaves: the *Jacquard* and the *dobby*.

BEST COPY AVAILABLE

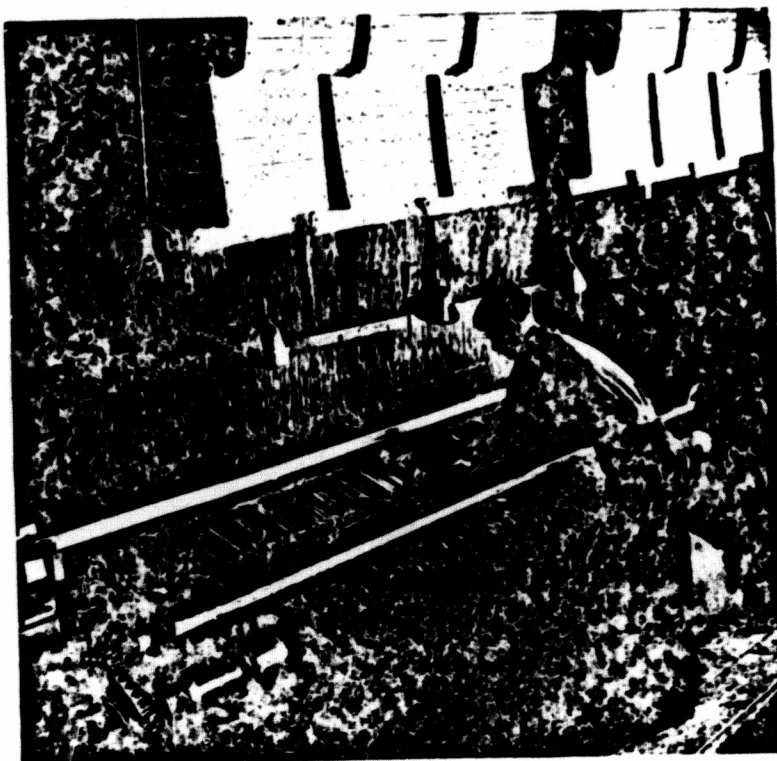


Figure 5.5. Top: A Jacquard loom. Left: Punching the cards for a Jacquard pattern.
(Photographs courtesy of Bigelow-Sanford Carpet Co., Inc.)

The most elaborate designs are woven on an intricately constructed loom called the Jacquard loom, and the weave of these fabrics is called the Jacquard weave. (See Figure 5.5.) The loom was invented by a Frenchman, Joseph Marie Jacquard, in 1801. Elaborate designs could not be made on the regular harness loom that makes the plain, satin, and twill weaves, because intricate designs require many variations in shedding. So it was necessary to find a means of controlling not a series of warps but individual warps. The Jacquard loom supplied the need.

This loom is very expensive and requires a room with a fairly high ceiling to house it. Several weeks to three months are needed to prepare the loom for making a new complicated pattern, and the weaving operation is comparatively slow. Many, however, consider Jacquard-woven cloths the most beautiful and most interesting of all. The price is correspondingly high. Since the Jacquard loom is extremely complicated, and a detailed explanation would be too lengthy, only an outline of its workings will be given.

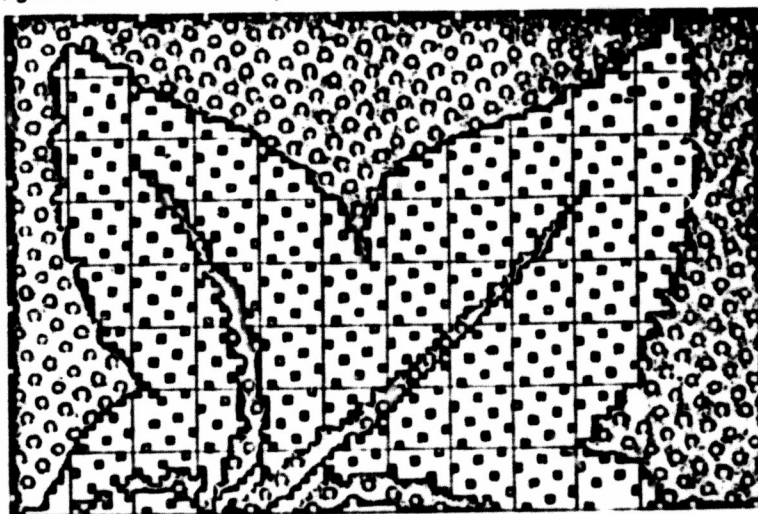
The design for the cloth is worked out in point-paper pattern first. Instead of harnesses, a series of oblong punched cards not unlike a large punched I.B.M. card controls the raising of the warps. As many cards are made as there are picks in the design. In other words, if there are 4,000 picks or fillings to be shot across before the same design is repeated, 4,000 cards must be made, which involves much labor and expense.¹ The cards are laced together in proper order and are rotated over an oblong cylinder on the upper part of the loom. From a frame hang long cords that hold fine steel wires, each with an eye through which a warp yarn is threaded. If the cloth is to have 4,500 warps, there will be 4,500

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Fancy Weaves: Pile,
Jacquard, Dobby,
and Leno

¹ Compare with Jacquard-weave patterns for shuttleless looms, p. 89.

Figure 5.6. Pattern for a Jacquard weave.



of these wires, one to control or lift each warp. It is quite evident that a great deal of effort and work are required to thread 4,500 warps through the eyes.

At the top of the loom each of these many cords is attached to a horizontal wire called a needle. These needles press forward against a card. The needles that go through the punched holes in the card pull on the cords that raise the warps to form the shed. The shuttle shoots through. The card just used is automatically passed on by a partial turn of the oblong cylinder, and the next card is raised into position for contact with the needles. Again and again the principle of shedding is carried out until all the cards have been used once. The pattern is then repeated.

In view of the skill required to make the cards, the labor and time required to set up the loom, and the slow action of the loom, it is small wonder that Jacquard weaves are expensive. Even though the use of the same cards again and again helps to decrease the price, the weaving is accomplished very slowly. To save expense, when one cloth is completed, new warps are tied to the old ones and pulled through the loom, and another cloth is begun. Jacquard attachments are used on many types of looms and knitting machines.

The Jacquard weave is really a combination weave; two or more of the basic weaves are combined in the same cloth. For example, in table damask the design may be a sateen weave with filling floats, and the background may be a satin weave with warp floats. (For the difference between single and double damask see Chapter 18, p. 514.) The sheen in the design runs in the opposite direction from that in the background, with the result that the design stands out clearly. Different colored yarns for warp and fillings make an even sharper contrast.

In a brocade the background may be a warp satin and the design may be a fine twill or plain rib. Rayon and cotton damask draperies are made with mercerized cotton in the design and rayon in the background. In borders of turkish towels the design may be in pile weave and the background in plain or basket weave.

IDENTIFICATION OF WARP AND FILLING IN JACQUARD WEAVE

If a combination of satin and sateen weaves is used, the warp usually floats in the background and the filling floats in the design when observed from the right side of the cloth.

Figure 5.7. A traditional damask in Jacquard weave with 100 per cent Enka nylon warp. (Photograph courtesy of American Enka Corporation.)



In fact, the warp is most easily distinguished if the background is observed first. If the background is plain or twill weave, the principles of identifying warp and filling in these constructions should be applied. (See Chapter 4.)

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Fancy Weaves: Pile,
Jacquard, Dobby,
and Leno

FACTORS GOVERNING THE DESIRABILITY OF JACQUARD WEAVE

As the satin construction appears frequently in either the background or the design of a Jacquard weave, the length of the float affects the wearing quality of the fabric. This principle is especially true in table damasks, which have to stand much friction and laundering. If long floats are used, the fabric shows a higher sheen, but durability is decreased. Cotton used in long floats is apt to lint as a result of friction. A loose weave in Jacquard construction is a great deal weaker than a tight, close weave. In selecting a cloth with a Jacquard weave, the purpose for which the fabric is intended and the kind of wear expected should be carefully considered.

CLOTHS MADE IN JACQUARD WEAVE

The more important Jacquard cloths are listed below. (These cloths may be made in mixtures of natural and/or synthetic fibers.)

COTTON	LINEN	RAYON	SILK	WOOL
damask	damask	damask	damask	damask
terry cloth	borders	brocade	brocade	brocatelle
(with Jacquard	of huck	brocatelle	brocatelle	tapestry
designs or	towels	lamé	tapestry	
borders)			lamé	
tapestry				

h23a

MADE IN BELGIUM
Belle
Greeff
Fabrics, Inc.
HALEDON, N. J. 07508

Your Order No. _____

Piece No. _____

Patt. **CAMELOT**

Color _____

Yards _____

Remarks _____

Fabric Design Copyright

© by Greeff Fabrics, Inc.

Not a Greeff product.

Please make sure that this fabric is
satisfactory for your purpose. No claims
will be allowed after cloth has been cut.

EXHIBIT B

EXHIBIT B

Los Angeles, Calif.: Los Angeles Furniture Mart

Chicago Showroom: American Furniture Mart

New York Showroom: 205 Lexington Avenue

Not a Greeff product
by Greeff Fabrics, Inc.
Fabric Design Copyright

New York Phone: 212-564-8640

New Jersey Phone: 201-742-9303

2 John Street, Haledon, N. J. 07508

Fabric Design Copyright
by Greeff Fabrics, Inc.
Not a Greeff product.

Pattern
Color
Width 54"
Price

*Belle
Fabrics
Inc.*

Fiber Content

.....% Cotton
.....% Rayon
.....

EXHIBIT C

425a

STOLL AND STOLL

ATTORNEYS AT LAW

EMPIRE STATE BUILDING

NEW YORK, NEW YORK 10001

PATENTS, TRADEMARKS
COPYRIGHTS

SAMUEL J. STOLL
ROBERT S. STOLL

JORIS S. HOFFMAN

212 PENNSYLVANIA 6-0290
CABLE ATTYSTOLL NEWYORK

January 21, 1976

Mr. Jeremiah Lewkowicz
Belle Fabrics, Inc.
2 John Street
Haledon, New Jersey 07508

Dear Mr. Lewkowicz:

Your request of January 16, 1976 for an extension of the limited license agreement for the sale of Camelot fabric beyond the current expiration of May 1, 1976 has been carefully considered.

Greeff has consistently maintained a policy of stopping rather than condoning infringements. While uniformly pursuing its policy, Greeff takes pains not to cause undue hardship on infringers, particularly those who may not themselves be directly responsible for creating the infringement. Thus, in your case, Greeff has given you a limited license under its CONTEMPLATION copyright in order to help prevent an unreasonable burden. It appears, however, that the license which has been granted to May 1, 1976 should be sufficient and we regret that we must therefore decline your request for an extension.

Very truly yours,

Robert S. Stoll

RSS/gk

cc: Greeff Fabrics, Inc.
Messrs. Popper & Bobis

EXHIBIT D

AMENDMENT TO Agreement dated as of October 20, 1975
 ("Agreement") between Greeff Fabrics, Inc., 150 Midland Avenue,
 Port Chester, New York ("Greeff") and Belle Fabrics, Inc.,
 2 John Street, Haledon, New Jersey ("Belle").

WHEREAS, pursuant to paragraph 3 of said Agreement,
 Greeff has granted to Belle a limited, non-assignable license
 to continue to sell Belle's "CAMELOT" fabric, which license
 will terminate on May 1, 1976, and

WHEREAS, Belle has advised Greeff that Belle has been
 unable to fill current orders for such fabric and that term-
 ination of said limited license on May 1, 1976 will cause
 undue hardship to Belle,

NOW THEREFORE, in consideration of the benefits to be
 mutually derived herefrom, the parties agree as follows:

1. Belle represents that it has scrupulously applied
 and will continue to scrupulously apply the following copy-
 right notice to all CAMELOT fabric or reproductions thereof
 sold or displayed in any form:

Fabric Design Copyright
 © by Greeff Fabrics, Inc.
 Not a Greeff product.

This notice shall be applied to each repeat of the pattern.

2. Greeff, in reliance upon the foregoing represent-
 ation, hereby agrees to extend the term of said limited license
 for a period of three months, and said limited license will
 terminate August 1, 1976, upon the terms and conditions hereof
 and of said Agreement. There shall be no promotion or adver-
 tising after April 1, 1976, and sales and shipments will be
 limited to presently existing orders.

*S/S
 J.L.*

3. Greeff will without obligation consider further extensions of the term of the limited license on a month-to-month basis, for not more than two additional months, upon a showing of need by Belle.

4. The parties covenant and agree that all other provisions of said Agreement not inconsistent herewith are continued in full force and effect.

In Witness Whereof, the parties have executed this Amendment as of the 23rd day of ^{April} ~~March~~, 1976.

Greeff Fabrics, Inc.

By Sam J. Stoll
Attorney

Belle Fabrics, Inc.

By [Signature]

420

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ORIGINATOR

How Fed

MALDEN MILLS, INC.

46 STAFFORD STREET LAWRENCE, MASS. 01841

No. 36293 - 65

Complete Purchase Order No. above must appear on all invoices, bills of lading, packages and correspondence.

**LAWRENCE SHIPMENTS;
DELIVER VIA CHASE STREET ENTRANCE**

VENDOR SHIP TO -

TO

Elmtex, Inc.
22 Main St.
Westfield, Mass. 01085

PLEASE FURNISH THE FOLLOWING IN EXACT ACCORDANCE WITH THIS ORDER AND CONDITIONS ON REVERSE HEREOF

PLEASE FURNISH THE FOLLOWING IN EXACT ACCORDANCE WITH THIS ORDER AND CONDITIONS ON REVERSE HEREOF			
DATE REQUIRED	FOB	TERMS	SHIP VIA
10-21-75	RUSS	S/P	N/30
QUANTITY	M.M. CODE	DESCRIPTION	PRICES AND/OR DISCOUNTS
4 screens		Pattern #1197	132.50 ea.
1. Repeat as large as possible. 2. Stagger fit and good trapping wherever possible. 3. Keep 3" empty on the sides of the screens.			

HEREBY ORDER THE MERCHANDISE SPECIFIED HEREIN ON ALL THE TERMS SET FORTH ON THE FACE AND REVERSE SIDES HEREOF INCLUDING ARBITRATION. THIS PURCHASE ORDER SUPERSEDES SELLER'S ORDER FORM, IF ANY, CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SHALL BECOME A CONTRACT FOR THE ENTIRE QUANTITY ORDERED UPON YOUR DELIVERY TO US OF ANY PART OF THE MERCHANDISE SPECIFIED HEREIN OR UPON ANY OTHER ACT INDICATING YOUR ASSENT HERETO.

VOICE INSTRUCTIONS 1. INVOICE IN TRIPLICATE 2. ATTACH COPY OF BILL OF LADING TO INVOICE 3. SHOW TERMS OF PAYMENT AND F.O.B. POINT

SHOW COMPLETE PURCHASE ORDER NUMBER

☐ Subject New Jersey Sales Tax ☐ Subject Vermont Sales Tax ☐ Subject Mass. Sales Tax
☐ Exempt New Jersey Sales Tax ☐ Exempt Vermont Sales Tax ☒ Exempt Mass. Sales Tax
 Certificate No. 220-735-385 Certificate No. 10071 **UNDER SECTION 1 SUBSECTION 6**

MALDEN MILLS, INC

By

AUTHORIZED SIGNATURE

[illegible]

ELI TEX INC.
22 Main Street
Westfield, Mass. 01085

12 188

No. 4572

Date 11/26/75

SOLD TO MALDEN MILLS, INC.
46 Stafford Street
Lawrence, Mass. 01841

SHIP TO Same

OUR ORDER NO.	YOUR ORDER NO.	SALESMAN	TERMS	SHIPPED VIA	PPD COLL
0405	36238-65		30 Days	Wajer	X
QUANTITY	DESCRIPTION			PRICE	AMOUNT
4	Pattern #1197			133.50	534.50

600-209-6650

This invoice was passed for
A/Payable processing
Apv # 97131
Date

13

ALL claims and returned goods MUST be accompanied by this bill.



SNAP A-PART
47-104
MADE IN U.S.A.

Received by

Defender - 20 -

- 430a -

SHIPPER'S NO.

CARRIER'S NO.

subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

Sign 22

19 7

FROM

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, counted and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at its destination, in its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party, any and all interests in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official Southern, Western and Illinois Rail Classification in effect on the date hereof, (2) in the applicable motor carrier classification or (3) in the applicable water carrier classification in effect on the date hereof. Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof set forth in the classification or tariff which governs this transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns. (Mail or street address of consignee—For purposes of notification only.)

CONSIDERED TO

DESTINATION

STATE

COUNTY

DELIVERY ADDRESS★

(★To be filled in only when shipper desires and governing tariffs provide for delivery thereto.)

ROUTE

DELIVERING CARRIER*

CAR OR VEHICLE INITIALS

NO.

[illegible]

SHIPPER, PER

AGENT. PER

Permanent post-office address of shipper,

PAQUETTE STATIONERY CO., SOUTHBRIDGE, MASS. ☐

3

PLAINTIFF'S MEMORANDUM OF LAW ON
ADEQUACY OF COPYRIGHT NOTICE PAGE 2,
POINT 2

2. Belle's use of the copyright notice is rigorous and in accordance with the requirements of the limited license.

The affidavit of J. Lewkowicz is clear: plaintiff's copyright notice is at all times scrupulously applied to all of the fabric in question sold or displayed in any form, see paragraphs 3 and 4 of the affidavit. This is uncontroverted and, since the burden is defendant's to show non-affixation of the copyright notice, Modern Aids, Inc.v. R.H. Macy & Co. Inc., 264 F.2d 93 (CA2 1959), it must be taken as fact that Belle's fabric in question entered commerce with a proper copyright notice.

MEMORANDUM DECISION OF AUGUST 11, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

GREEFF FABRICS, INC.,	:	
	:	MEMORANDUM
Plaintiff,	:	<u>DECISION</u>
	:	
-against-	:	
	:	76 Civ. 1188
MALDEN MILLS INDUSTRIES, INC.,	:	(JMC)
	:	
Defendant.	:	

-----X

CANNELLA, D.J.:

Plaintiff's complaint, after a bench trial, is hereby dismissed.

The circumstances surrounding this copyright infringement action as well as the applicable law have been discussed in detail in this Court's decision on the motion for a preliminary injunction, dated April 13, 1976. As that opinion indicated, the questions of fact crucial to the outcome of this litigation are (1) whether the sale of "Camelot" fabric by Belle Fabrics, Inc. ["Belle"] without statutory copyright notice was authorized by Greeff Fabrics, Inc. ["Greeff"], the copyright owner, and (2) whether the licensing agreement under which these sales were made falls within the limited exception to the notice requirement delineated in H.M. Kolbe Co. v. Armigus Textile Co., 315 F.2d

70, 73-75 (2d Cir. 1963) and Judscott Handprints, Ltd. v. Washington Wall Paper Co., 377 F.Supp. 1372, 1378 (E.D. N.Y. 1974).

The Court finds that after October 20, 1975 and prior to the institution of this action, Greeff knew that Belle was selling fabric embodying the subject design which did not have sufficient copyright notice affixed thereto. The Court further finds that the Greeff-Belle licensing agreement, and Belle's sales thereunder, extend far beyond the scope of the Kolbe-Judscott exception. Thus, the copyright protection previously accorded Greeff's "Contemplation" design has been forfeited.

DISCUSSION

It is clear that Belle initially sold the fabric in bolts of approximately fifty (50) yards, each containing a single copyright notice affixed via a tag or piece ticket attached to each bolt.^{1/} After taking the position at the preliminary injunction stage of these proceedings that this notice was in complete conformity with statutory requirements (a position rejected by this Court's decision of April 13, 1976) as well as the licensing agreement, plaintiff switched horses in midstream and attempted to show at trial that prior to the institution of this action it possessed

no knowledge whatsoever of Belle's method of affixing the copyright notice to the fabric. Plaintiff contended that it had assumed that the notice was being affixed in accordance with the requirements of the statute, to wit, once for each repeat of the fabric design. However, the Court finds that plaintiff was aware that notice of its copyright proprietorship did not appear on every repeat of the licensed fabric sold by Belle. This conclusion is based upon plaintiff's position on the motion for a preliminary injunction, the fact that the rubber stamp could not be used to print the notice directly on the fabric, the affidavit of Belle's president explaining the impracticability of attaching some seventy (70) tickets to each bolt of fabric and the availability of at least two relatively simple and inexpensive methods of permanently affixing the notice directly to the fabric at every repeat, had this been Greeff's intention.^{2/}

Greeff also argues that it preserved its copyright protection by imposing on Belle, via the licensing agreement, a duty to use proper copyright notice with respect to the licensed fabric and thus cannot be held responsible for Belle's errors in that regard. There are factors, however, which undercut this argument. The most telling is the statement of Jeremiah Lewkowicz, Belle's

president, that he had

at all times scrupulously applied the Greeff copyright notice to all Camelot fabric sold or displayed in any form in strict accordance with the requirements of the limited license. In fact, in order to avoid possible misunderstandings or errors, I asked Greeff's attorney to provide the proper copyright notice to me and this was done in the form of a rubber stamp.

(Affidavit of Jeremiah Lewkowicz, March 17, 1976 ¶ 3.)

Although at trial Lewkowicz retracted the assertion that the notice was applied in accordance with the requirements of the licensing agreement and maintained that the decision to apply the copyright notice to one ticket per bolt was entirely Belle's, Greeff cannot escape responsibility for the inadequate notice as its attorneys were asked to provide the proper notice, and the method it provided was clearly not suited for affixation of a notice at every repeat of the design.^{3/}

Greeff's final claim is that because Belle's sales were allowed solely as part of an agreement in settlement of copyright litigation, they were unauthorized publications under the Kolbe and Judscott cases. However, the Court finds those cases inapplicable in that the scope of the instant licensing agreement extends far beyond the limited exception delineated therein.

Although the affidavit of Jeremiah Lewkowicz, president of Belle Fabrics, dated March 17, 1976 and filed in Court on March 19, 1976 describes the October 20 licensing agreement as a limited license providing for the order's closeout of Belle's Camelot line, it is apparent to the Court that this was not the case. After the licensing agreement was entered into the subject pattern became more popular and Belle continued to receive reorders. (See Affidavit of Jeremiah Lewkowicz, President of Belle, April 23, 1976 ¶ 2.) Belle filled these orders by itself placing new orders with its Belgian producer and sales eventually increased to such a level that Belle requested and was granted an extension of the license from the original termination date of May 1, 1976 until August 1, 1976. In fact, sales which had totalled only 11,000 yards prior to the execution of the licensing agreement have increased to a point where, at the time of trial, monthly sales approached that amount. Of course, Greeff was aware of these increasing sales, both due to the royalties it has continued to receive and because of the requested extension of the license.

In sum, defendant has satisfied its burden of proving that the sale of Camelot fabric by Belle without statutory /copyright notice was authorized by Greeff, the copyright

owner. The design was therefore forfeited to the public domain and could not be the subject of an infringement. Thus, plaintiff's first cause of action is dismissed.

As stated by the Court during the trial of this action, there is absolutely no evidence in the record of any injury to plaintiff due to the appearance of a copy-right symbol next to the Malden name on the reverse side of Malden's strike-offs of the fabric design in question. Accordingly, this claim is dismissed.

CONCLUSION

For the reasons stated above, plaintiff's complaint in the instant action is dismissed with prejudice. The foregoing constitute the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Civil Procedure 52(a).

SO ORDERED.


JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
August 11, 1976.

F O O T N O T E S

- 1/ The tag measured 2-3/8" X 4-3/4" and was attached to each roll of fabric through the use of a metal barb which was affixed to a string looped through a hole in the tag. The following legend was printed on the tag:

BELLE
FABRICS, INC.
HALEDON, N.J. 07508

Your Order No. _____

Piece No. _____

Patt. _____

Color _____

Yards _____

Remarks _____

Please make sure that
this fabric is satis-
factory for your purpose.
No claims will be allowed
after cloth has been cut.

and, using the rubber stamp supplied by plaintiff's counsel, the following notice was printed on the tag:

Fabric Design Copyright
© by Greeff Fabrics, Inc.
Not a Greeff product.

- 2/ At trial Milton Glasser, manager of the Print Division of Malden Mills, Inc., demonstrated a method whereby the legend Greeff Fabrics © (intentionally

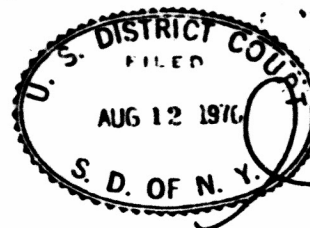
misspelled for the purposes of the demonstration) was printed on the subject material by pressing a substance called "heat transfer paper" against the material with a heated, hand-held iron. In addition, Glasser testified as to how this could be done mechanically.

3/

At trial, Lewkowicz testified that he could not recall whether he informed Greeff's attorneys of the manner being used to comply with the copyright notice requirement. Because plaintiff's counsel agreed not to testify at trial in exchange for defendant's withdrawal of its motion to disqualify them from the case, the Court was deprived of perhaps the most cogent evidence regarding Greeff's knowledge of Belle's practices.

440a
JUDGMENT OF AUGUST 12, 1976

Cannella, J. 47



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----- X
GREEFF FABRICS, INC.

76 Civil 1188 (JMC)

Plaintiff :
-against-

MALDEN MILLS INDUSTRIES, INC. :

JUDGMENT

Defendant
----- X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable John M. Cannella, United States District Judge, on July 13 and 14, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on August 11, 1976, having handed down its memorandum decision, constituting its findings of fact and conclusions of law, in favor of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant MALDEN MILLS INDUSTRIES, INC., have judgment against plaintiff GREEFF FABRICS, INC., dismissing the action, with prejudice.

Date: New York, N.Y.
August 12, 1976

Reynold F. Berghardt
Clerk

441a

NOTICE OF APPEAL FROM JUDGMENT OF AUGUST 12, 1976
AND DECISION OF AUGUST 11, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GREEFF FABRICS, INC., :
Plaintiff, :
-against- : 76 Civ. 1188 (JMC)
MALDEN MILLS INDUSTRIES, INC., :
Defendant. :
-----X

Notice of Appeal

Notice is hereby given that plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated and entered herein on August 12, 1976, and the decision dated and entered herein on August 11, 1976, embodying findings of fact and conclusions of law.

Dated: New York, New York
August 17, 1976

Stoll and Stoll
Attorneys for Plaintiff
Empire State Building
New York, New York 10001

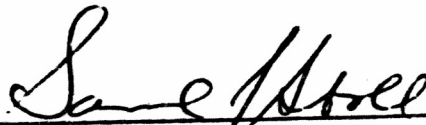
By Samuel J. Stoll
A Member of the Firm

To: Clerk,
United States District Court
Southern District of New York

Kreindler, Relkin & Goldberg, Esqs.
Attorneys for Defendant
500 Fifth Avenue
New York, New York 10036

CERTIFICATE OF SERVICE

It is certified that a true copy of the foregoing Notice of Appeal was this 17th day of August, 1976, duly personally served on Kreindler, Relkin & Goldberg, attorneys for defendant, at their office at 500 Fifth Avenue, New York, New York.



Attorney for Plaintiff.

Two (2)

Joint Appendix

Oct. 1976 2:50 PM

Cellanik